Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITIBANK (SOUTH DAKOTA), N.A.,
Petitioner,

v.

MARC SHERMAN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, include late payment fees that are charged by a national bank on credit card accounts?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Citibank (South Dakota), N.A. states that it is a wholly-owned subsidiary of Citicorp Holdings, Inc., which in turn is a wholly-owned subsidiary of Citicorp.

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR A WRIT OF CERTIORARI

Citibank (South Dakota), N.A. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported as *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 WL 710414 (N.J. Nov. 28, 1995); the opinion is set forth in the Petitioner's Appendix ("Pet. App.") at 1a-62a. The opinion of the Appellate Division is reported as *Sherman v. Citibank (South Dakota), N.A.*, 272 N.J. Super. 435, 640 A.2d 325 (App. Div. 1994); it is set forth in the Pet. App. at 63a-76a. The order of the trial court is unreported and is attached hereto in the Pet. App. at 77a.

JURISDICTION

The Supreme Court of New Jersey entered its judgment on November 28, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85 and 86, are set out in full in the Pet. App. at 78a-80a, respectively. Section 85 provides, in pertinent part, that:

> [a]ny [national banking] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . .

Section 86 provides, in pertinent part, that:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title . . . shall be deemed a forfeiture of the entire interest [and] [i]n case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back . . . twice the amount of the interest . . . .

Section 54-3-1.1 of the South Dakota Codified Laws provides, in pertinent part, that:

> Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no

> maximum interest rate or charge, or usury rate restriction between or among persons, corporations, limited liability companies, estates, fiduciaries, associations, or any other entities if they establish the interest rate or charge by written agreement.

Section 54-3-1 of the South Dakota Codified Laws provides as follows:

> Interest is the compensation allowed by law for the use, or forebearance, or detention of money or its equivalent, including without limitation, points, loan origination fees, credit service or carrying charges, charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit. These charges do not include charges made by a third party.

The New Jersey Retail Installment Sales Act of 1960, N.J.S.A. §§ 17:16C-50, 17:16C-54, is set out in the Pet. App. at 81a-82a. The New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-2, 56:8-19, is set out in the Pet. App. at 83a-84a.

STATEMENT

Citibank (South Dakota), N.A. petitions the Court to grant a writ of certiorari to resolve the direct conflict between the highest courts of different states on an important question of federal law: whether the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees. The decision of the New Jersey Supreme Court, from which review is sought, is contrary to recent decisions of the California Supreme Court in *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *petition for cert. filed*, No. 95-860 (U.S. Nov. 30, 1995), and the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449 (Colo. Nov. 20, 1995), and *Richardson v. Citibank (South Dakota)*, N.A., No. 94SC670 (Colo. Dec. 18, 1995). It is inconsistent as well with

the decision of the First Circuit in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). The New Jersey decision also rejects the interpretation of section 85 of the National Bank Act by the Office of the Comptroller of the Currency ("OCC"), which charters and supervises national banks, including Citibank.

The federal question presented is very important. National banks lend hundreds of billions of dollars every year on terms set in reliance on the authority conferred by section 85 to collect charges for the use or detention of their money. Uncertainty about the extent of that authority would "throw into confusion the complex system of modern interstate banking." *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 312 (1978). Moreover, very large amounts are at stake in the present case and other cases pending around the country. Citibank therefore respectfully requests that the Court issue a writ of certiorari in this case. In plenary briefing, Citibank will urge the Court to reverse the judgment of the Supreme Court of New Jersey.

Background

Citibank is a national banking association chartered by the OCC, a unit of the Treasury Department. Citibank's only location is in Sioux Falls, South Dakota. From that location, Citibank issues Visa, MasterCard, and other credit cards to customers nationwide, extends credit pursuant to the agreements governing such cards, and collects the charges that cardholders have contracted to pay. Citibank's credit card agreements generally provide for both "finance charges" on certain outstanding balances and "late payment fees" if a cardholder fails to make a required payment by a specified date.

Respondent Marc Sherman filed his complaint against Citibank as a purported class action on February 19, 1992, and his amended complaint on June 17, 1992, both

in the Law Division of the New Jersey Superior Court of Camden County. Sherman alleged that he is a New Jersey resident and that Citibank assessed late payment charges on his Citibank Visa credit card account. Although such charges were consistent with the express terms of his card agreements with Citibank and were permitted under the law of South Dakota, Sherman alleged that such charges are impermissible under the New Jersey Retail Installment Sales Act of 1960, (Pet. App. at 81a-82a), the New Jersey Consumer Fraud Act, (Pet. App. at 83a-84a), and New Jersey common law.

How the Federal Question Was Presented and Resolved Below

Sherman's claim was predicated entirely on the contention that the late payment charges assessed by Citibank on credit card accounts of New Jersey residents violate New Jersey statutory and common law. On September 19, 1992, Citibank moved to dismiss Sherman's amended complaint for failure to state a claim upon which relief may be granted. Citibank argued principally that section 85 of the National Bank Act empowers Citibank, as a national bank, to receive interest charges at any rate that its home state allows the most favored state-regulated lender to charge; that late payment charges are "interest" within the meaning of section 85; that Citibank's home state, South Dakota, allows state-regulated lenders to receive credit card late payment charges; and that, as this Court held in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 308 (1978), section 85 preempts any contrary state law.

The Law Division granted Citibank's motion to dismiss under section 85. (Pet. App. at 77a.) On April 22, 1994, the Superior Court of New Jersey, Appellate Division, issued an opinion affirming the Law Division's decision, noting that "[a] number of recent federal decisions persuasively reason that late charges are interest within

the meaning of federal law." (Pet. App. at 67a.) On October 19, 1994, the Supreme Court of New Jersey granted review and, on November 28, 1995, it reversed the judgment of the Appellate Division. Concluding that it should read Section 85 of the National Bank Act narrowly to minimize the preemption of state law, the court held that "late-payment fees are not 'interest' within the intendment and purposes" of section 85 of the National Bank Act. (Pet. App. at 2a.) The court held, instead, that "interest" in section 85 "refers only to the periodic percentage rate charged on outstanding balances." (*Id.*) Three of seven justices dissented.

In reaching its result, the majority in the New Jersey Supreme Court rejected as "unpersuasive" the First Circuit's decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993), and the cases on which the First Circuit relied. (Pet. App. at 11a.) The court also expressly declined to follow the California Supreme Court's decision in *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *petition for cert. filed*, No. 95-860 (U.S. Nov. 30, 1995), the Colorado Supreme Court's holding in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449 (Colo. Nov. 20, 1995), and the OCC's interpretive rulings regarding this issue. (*See* Pet. App. at 85a-101a.)

REASONS FOR GRANTING THE PETITION

Section 85 of the National Bank Act, 12 U.S.C. § 85, empowers a national bank to collect "interest" at rates allowed to the most-favored state-regulated lender by the laws of the state in which the national bank is located. *See Tiffany v. National Bank*, 85 U.S. (18 Wall.) 409 (1874). The question presented in this case is whether "interest," as used in section 85, includes flat late-payment fees on credit card accounts. If the answer to that federal question is "yes," then state laws purporting to impose

conflicting limits on national bank late-payment charges are preempted. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). This Court should grant the writ in this case to resolve the question because, first, state supreme courts have now reached directly conflicting answers and, second, the question is of great importance to national banks, their customers, and the banking system.

I. THE NEW JERSEY SUPREME COURT ANSWERED THE FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND IS EXPRESSLY INCONSISTENT WITH A DECISION OF THE FIRST CIRCUIT.

A principal purpose of this Court's certiorari jurisdiction is to resolve conflicts among state courts of last resort on important issues of federal law. *See* Sup. Ct. R. 10(b). The decision of the Supreme Court of New Jersey directly conflicts with the California Supreme Court's decision in *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *petition for cert. filed*, No. 95-860 (U.S. Nov. 30, 1995). Indeed, the losing plaintiff in *Smiley* has filed a petition seeking this Court's review of that case, citing conflict with the present case, and Citibank, the defendant in both cases, is filing a response supporting that petition (after restating the question presented to reflect the California court's decision more accurately).

The decision in the present case also conflicts with the decision of the court of last resort in Colorado, *see Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449, at *6 (Colo. Nov. 20, 1995) ("We conclude that the [National Bank Act]'s purpose and legislative history compel a finding that late payment fees are a form of 'interest' under Section 85 of the National Bank Act."). After the New Jersey decision in the present case, the Colorado Supreme Court reaffirmed its

conclusions in another case in which Citibank is a defendant, stating that it was "not persuaded by the [New Jersey] court's reasoning." *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, slip. op. at 3 n.1 (Colo. Dec. 18, 1995). The New Jersey Court's decision is at odds as well with the resolution of a very similar federal question by the First Circuit, *see Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) (holding that both section 85 and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1831d, a parallel federal statute governing state-chartered banks insured by the FDIC, preempt Massachusetts law prohibiting late charges), *cert. denied*, 113 S. Ct. 974 (1993).

Resolution of the federal issue raised by this case will also resolve or affect numerous cases pending in lower courts throughout the country. Other cases, similar to those referred to above, are pending in (or have recently been decided by) state and federal courts in Alabama, California, Minnesota, New Jersey, Pennsylavnia, and Wisconsin.[1]

II. THE PROPER INTERPRETATION OF SECTION 85 IS A QUESTION OF SUBSTANTIAL IMPORTANCE

Section 85 empowers a national bank to charge interest at any rate permitted by the law of its home state to the most-favored state-regulated lender. *See Tiffany*, 85 U.S.

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[1] *See, e.g., Hunter v. Rich's Dep't Store*, No. CV 95-PT-1548-S (N.D. Ala. Aug. 31, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted and opinion superseded by* 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal.), *and review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995); *Tikkanen v. Citibank (South Dakota) N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994), *allocatur granted*, 540 Pa. 638, 659 A.2d 557 (1995); *Ament v. PNC Nat'l Bank*, 849 F. Supp. 1015 (W.D. Pa. 1994) (appeal pending); *Wisconsin v. Ameritech Corp.*, No. 92 CV 1013 (Wis. Cir. Ct. July 14, 1993) (appeal pending).

(18 Wall.) at 412-13. The issue in this case is whether the term "interest," and therefore the federal right, extends to all charges for the use or forbearance of money, or, as the New Jersey Supreme Court held, only "to . . . periodic percentage rate[s] charged on outstanding balances." (Pet. App. at 2a.) The answer to that question, which will determine whether a national bank planning its package of loan charges for a nationwide lending program may look only to federal and home state law or must examine and conform to the laws of all fifty states, is of great practical imporance to banks and their customers.

Federal and state courts have traditionally interpreted the term "interest" in section 85 to encompass all charges for the use or forbearance of money, including late charges. (*See* Pet. App. at 40a-41a (dissenting opinion of Justice Pollack, citing cases).) They have determined that the term "interest," as ordinarily used in 1864, was amply broad to cover all such charges. Moreover, they have concluded that section 85 can achieve its stated purpose of protecting national banks against state-law restraints only if "interest" covers all such charges.

The OCC has repeatedly agreed, concluding in particular that late payment fees are governed by section 85. *See* Letter from Julie L. Williams, Chief Counsel, Office of the Comptroller of the Currency (Feb. 17, 1995), *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Interpretive Letter 670) (Pet. App. at 85a-101a). Most recently, the OCC has proposed a formal interpretive rule codifying its definition of the term "interest" in section 85; the pending rule would state explicitly that late payment fees are "interest" within the meaning of section 85. *See* 60 Fed. Reg. 11,924, 11,940 (1995) (to be codified at 12 C.F.R. § 7.4001) (proposed Mar. 3, 1995).

National banks, including Citibank, have relied on these long-standing judicial and administrative opinions

in structuring their interstate lending programs, including their credit card programs. The conflict between the California and New Jersey interpretations of section 85 makes it impossible for a national bank (and, in particular, Citibank, the defendant in both cases) to determine what law governs the charges it may seek to collect in connection with loans such as these. The OCC emphasized this concern in its *amicus curiae* brief filed with the Supreme Court of New Jersey in support of Citibank:

> National banks, such as Defendant/Respondent in this action, have relied on the OCC's interpretation of Section 85 and have structured their lending programs to conform to these longstanding interpretations. Indeed, national banks lend millions of dollars of credit every day in reliance on the lending authority conferred by Section 85 and the laws of their home states. Section 85 provides national banks predictability about their lending operations by setting a uniform standard for determining the charges that may be assessed in connection with those activities. This predictability and uniformity is critical to interstate lending. If the permissible charges for a credit card transaction were determined with reference to the home state of the borrower, the flow of interstate lending would be severely undermined.

Brief of *Amicus Curiae* Comptroller of the Currency in Support of Respondent and Defendant at 2, *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 WL 710414 (N.J. Nov. 28, 1995).[2] National banks simply

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[2] In addition, it is important for national banks to know that they can rely on the guidance of the OCC. The OCC is charged with the administration of the National Bank Act and has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of banks organized under the National Bank Act, including the power to determine whether a bank's activity is permissible under the national banking laws. *See Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). This Court has frequently held that the OCC's interpretation of the National Bank Act is entitled to judicial deference if that interpretation is based

cannot lend hundreds of billions of dollars a year if they are uncertain what law will govern their loan charges.

It is also important that this Court resolve the conflict so that state legislatures can determine their regulatory jurisdiction. Indeed, several states, including California, Colorado, and New Jersey, have recently enacted or amended laws governing credit card late fees against the backdrop of law established by section 85, the judicial interpretations of section 85, and the interpretations of that statute by the OCC. *See Smiley*, 11 Cal. 4th at 145 n.2, 900 P.2d at 694 n.2, 44 Cal. Rptr. 2d at 445 n.2 (citing Cal. Fin. Code § 4001); *Copeland*, No. 94SC409, 1995 WL 696449, at *2 n.5 (citing U.C.C.S. § 5-3-203, 2 C.R.S.); *Sherman*, Pet. App. at 21a-22a (citing N.J.S.A. 17:16C-42(a)). It is therefore important that customers, the OCC, and state legislatures can determine what law governs charges on interstate loans by national banks.

Finally, the federal question presented is important because of the amounts at stake. Plaintiffs in the actions already pending are seeking hundreds of millions of dollars in damages. The large direct impact on national banks of claims arising out of past charges is an additional reason for granting the writ.

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on a permissible construction of the statute. *NationsBank, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 816-17 (1995); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

CONCLUSION

For the foregoing reasons, Citibank respectfully requests that the Court issue a writ of certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF NEW JERSEY

A-102 September Term 1994

MARC SHERMAN, on behalf of himself and all others and all others similarly situated,
Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Defendant-Respondent.

Argued February 15, 1995—Decided November 28, 1995

The opinion of the Court was delivered by HANDLER, J.

In this case, as in the companion case of *Hunter v. Greenwood Trust Co.*, —— *N.J.* ——, *rev'g* 272 *N.J. Super.* 526 (1994), also decided today, New Jersey credit-card customers contend that New Jersey's usury laws prohibit banks that issue those cards from charging late-payment fees to New Jersey customers.

The issues before us are more specifically framed by the claims and defenses of the respective parties. Plaintiff, as a named party in a class-action suit, challenges the legality of the late-payment fees that are charged to New Jersey holders of defendant Citibank (South Dakota) credit cards. Plaintiff argues that New Jersey's Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-50, -54 (RISA), forbids national banks that issue credit-cards to

New Jersey consumers from charging late-payment fees. Plaintiff also argues that defendant's failure to disclose in its cardmember agreements and advertising that late-payment fees are prohibited by New Jersey law violates New Jersey's Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-2, -19. Finally, plaintiff contends that the imposition of late-payment fees constitutes a common-law breach of contract and conversion.

Defendant relies on section 85 of the National Bank Act (NBA), which provides that a national bank may charge borrowers "interest at a rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 85. Citibank is a national bank chartered in South Dakota, and South Dakota includes late-payment fees in its statutory definition of interest. 272 *N.J. Super.* at 438. Citibank, therefore, contends that plaintiff's RISA claim, as well as plaintiff's other claims, conflict with, and are preempted by, section 85. *See id.* at 439. Thus, Citibank argues it is free to charge late-payment fees in New Jersey.

Following the commencement of this action, the Law Division granted the bank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super* 435 (1994). We granted plaintiff's petition for certification, 138 *N.J.* 270 (1994), and now reverse the dismissal of plaintiff's claims.

We determine that the understanding of "interest" as expressed and authorized in the NBA does not include distinctive and contingent loan terms or charges, such as late fees, that are unrelated to interest rates. We hold that late-payment fees are not "interest" within the intendment and purposes of the applicable federal statute. Rather, "interest at a rate allowed by the laws of the State . . . where the bank is located" refers only to the periodic percentage rate charged on outstanding balances. Therefore, plaintiff's state-law defenses to the bank's charges do not conflict with federal law, are not preempted, and the late-payment fees are illegal under New Jersey law.

I

Since the early years of the Republic, the states have generally resisted the development of national banks and favored their own state-chartered banks through regulatory legislation. William Oscar Scroggs, *A Century of Banking Progress* 50-51 (1924); John J. Knox, *A History of Banking in the U.S.* 12 (2d ed. 1969). The Supreme Court has, since *M'Culloch v. Maryland,* 17 *U.S.* (4 Wheat) 316, 4 *L. Ed.* 579 (1819), generally limited federal statutory involvement by construing preemption narrowly and giving relatively free rein to state usury law regulations. *See Anderson Nat'l Bank v. Luckett,* 321 *U.S.* 233, 64 *S. Ct.* 599, 88 *L. Ed.* 692 (1944); *McClellan v. Chipman,* 164 *U.S.* 347, 17 *S. Ct.* 85, 41 *L. Ed.* 461 (1896).

This Court, in considering preemption claims, must be cautioned by the longstanding presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 *U.S.* 725, 746, 101 *S. Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 595 (1981), and that it should not unnecessarily disturb "the federal-state balance." *United States v. Bass,* 404 *U.S.* 336, 349, 92 *S. Ct.* 515, 523, 30 *L. Ed.* 2d 488, 497 (1971). Indeed, greater restraint ought apply to preemption of spheres traditionally occupied by the states. Where the field that Congress is said to have preempted has been traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 *U.S.* 218, 230, 67 *S. Ct.* 1146, 1152, 91 *L. Ed.* 1447 (1947).

"It is well settled that state usury law restrictions on lending practices are so extensive and historically rooted as to form part of the consumer protection terrain 'traditionally occupied' by the states." *Greenwood Trust Co.*

v. Massachusetts, 776 *F. Supp.* 21, 27-28 (D. Mass. 1991), *rev'd*, 971 *F.*2d 818 (1st Cir. 1992), *cert denied*, —— *U.S.* ——, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993) (citing *Lewis v. BT Inv. Managers, Inc.*, 447 *U.S.* 27, 38, 100 *S. Ct.* 2009, 2016, 64 *L. Ed.* 2d 702, 713 (1980) ("We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern")); *Smiley v. Citibank (South Dakota), N.A.*, 44 *Cal. Rptr.* 2d 441, 465-66 (1995) (Arabian, J., dissenting) (same); *id.* at 467-68 (George, J., dissenting) (same). Accordingly, "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." *General Motors Corp. v. Abrams*, 897 *F.*2d 34, 41-42 (2d Cir. 1990) (upholding New York's "Lemon Law" against a claim that a Federal Trade Commission consent decree preempted major elements of the local law). Congress' failure to include an express preemption clause in section 85 necessitates a careful examination of whether the NBA conflicts with RISA's prohibition of late-payment fees.

Section 85 provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory or District where the bank is located*, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . .
>
> [12 *U.S.C.A.* § 85 (emphasis added).]

On its face, section 85 immunizes national banks that lend money beyond their home-state's borders from local usury laws that might give local banks a competitive

advantage. It also protects national banks during periods of inflation by overriding even the home-state's usury laws and permitting national banks to charge interest at a rate tied to the federal discount rate. *E.g. Tiffany v. National Bank*, 85 *U.S.* (18 Wall) 409, 412-13, 21 *L. Ed.* 862, 863-64 (1874) (holding that Congress, by enacting NBA, intended to protect national banks from hostile state usury laws); *Roper v. Consurve, Inc.*, 578 *F.* 2d 1106 (5th Cir. 1978), *aff'd sub nom., Deposit Guaranty Nat'l Bank v. Roper*, 445 *U.S.* 326, 100 *S. Ct.* 1166, 63 *L. Ed.* 2d 427 (1980) (holding section 85 was designed by Congress to mandate parity between national banks and local lenders). However, neither the plain meaning of the terms "rate" and "interest" in section 85, nor the legislative history of that provision indicates that these terms carry the expansive meaning inferred by defendant. *See Smiley, supra*, 44 *Cal. Rptr.* 2d at 469 (George, J., dissenting).

Since 1874, the Supreme Court has interpreted section 85 as entitling a national bank to charge the highest interest rate allowed to lenders by the laws of the state in which the bank is located. *Tiffany, supra*, 85 *U.S.* at 411-13, 21 *L. Ed.* at 863-64 ("The only mode of guarding against [state discrimination] was . . . to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate"). Courts have recognized that *Tiffany* construed section 85 to place national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally and not necessarily at a rate applicable to state banks, which might be lower. This ability to "borrow" an interest rate has come to be known as the "most-favored-lender" doctrine. *See, e.g., Fisher v. First Nat'l Bank*, 548 *F.*2d 255 (8th Cir. 1977) (recognizing that notwithstanding limitations on interest imposed on state banks by Nebraska law, national bank located in Ne-

braska could legally charge, with respect to credit-card transactions, rates allowed by Nebraska law to small loan companies).

In *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978), the Supreme Court relied on the NBA and its most-favored-lender doctrine to allow a national bank chartered in Nebraska to charge its credit-card customers in Minnesota a rate of interest authorized in Nebraska, but prohibited by usury law restrictions in Minnesota. *Id.* at 313-15, 99 *S. Ct.* at 548-49, 58 *L. Ed.* 2d at 545-46. The *Marquette* Court recognized that the "exportation" of interest rates from a national bank's "home state" into a foreign state would "significantly impair the ability of the States to enact effective usury laws," but it found that such impairment "has always been implicit in the structure of the National Bank Act since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Id. at* 318, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (citation omitted) (footnote omitted).

The Court, nonetheless, suggested Congressional action would be necessary to check the preemptive effect of the NBA in a time of national bank deregulation, tightened credit availability, and an increasingly nationalized credit-card lending system:

> This impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards. But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.
>
> [*Id.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548.]

Marquette does not mandate or encourage an extension of the "most-favored-lender" status to expand the definition of "rates" to include other non-interest rate charges. The national bank's authorized exportation of lending terms in *Marquette* was limited to numerical percentage-rate interest terms. The Court made no mention of the exportation of other credit-card terms, such as late charges, nor did its reasoning or rationale imply that discrete and specialized charges affixed to credit-card loans could be imposed on customers in other states. *See Smiley, supra,* 44 *Cal. Rptr.* 2d at 465 (Arabian, J., dissenting).

In the years following *Marquette,* Congress embarked on a mission to deregulate the banking industry. Interest rates soared, and while national banks could charge interest at a rate tied to the federal discount rate, state banks were constrained by local usury laws. *See Greenwood Trust, supra,* 971 *F.*2d at 826. Congress sought to rectify that obvious inequity by enacting the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 *U.S.C.A.* § 1831d (DIDA). *Ibid.* The language of section 521 of DIDA essentially mirrors that of section 85 of the NBA. Courts and federal agencies have interpreted section 521 as conferring on federally-insured state banks the same insulation from state usury laws that national banks have enjoyed under the NBA. *Id* at 826-27 (concluding that Section 521 permits federally-insured state banks to "export" interest rates); *Vanderweyst v. First State Bank,* 425 *N.W.*2d 803, 806 (Minn.) (concluding that section 521 gives federally-insured state banks "most favored lender" status), *cert. denied,* 488 *U.S.* 943, 109 *S. Ct.* 369, 102 *L. Ed.* 2d 359 (1988).

The legislative history of DIDA is instructive to our understanding of Congress' general understanding of interest and its intent with respect to the notion of interest contained in the NBA. *E.g. Copeland v. MBNA America Bank, N.A.,* —— *Colo.* —— (1995) (slip op. at 14). Although the NBA was enacted 100 years earlier,

the same tensions, namely parity betwen federal and state lenders and preservation of local usury laws, were present and these conflicting considerations generated substantial concerns surrounding the passage of the earlier banking statute.

The record of Congressional debate and deliberation concerning the enactment of DIDA strongly supports the understanding that preemption of credit-card regulation under DIDA is confined to traditional numerical interest rates. The central unifying purpose of DIDA was to provide for increased access to home mortgage loans. Section 501 of DIDA provided for preemption of state usury limits on mortgage loans in a manner virtually identical to the treatment of other loans (including credit-card agreements) in Title V of the Act, which contains section 521.

The Senate Report of deliberations over section 501 of DIDA restricts preemption and expressly reserves the regulation of "late charges" to the states.

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.
>
> [S. Rep. No. 96-368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 *U.S. Code Cong. and Ad. News,* Vol. 2, 236, 255.]

Subsequent legislative history links preemption concerns in section 501 both to the consideration of section 521, and to DIDA in its entirety as passed on March 27-28, 1980. Notably, Congress passed section 501 at the same time, and the same title (Title V) of the same act, as section 521.

During the discussion on the Senate floor of the various bills that figured in the development of DIDA, Senators Pryor and Bumpers proposed an amendment, S. 1988, to give state-chartered institutions "competitive equality" with national banks by allowing them to charge interest at one percent above the federal discount rate. 125 *Cong. Rec.* 30655 (1979). Senator Proxmire, floor manager of the Senate bills under discussion, and chairman of the Senate Banking Committee, understood the proposed amendment to override state usury laws and emphasized that there was "a sharp division and difference of opinion in the Senate." *Id.*

Separate hearings on the Pryor-Bumpers initiative, S. 1988, 96th Cong. 1st Sess. (1979) were held December 17, 1979, and though it was not reported out of committee, the bill's language was substantially incorporated into House Bill 4986, H.R. 4986, 96th Cong., 1st Sess. (1979), which was, in turn, enacted as DIDA. William M. Burke & Alan S. Kaplinsky, *Unraveling the New Federal Usury Law*, 37 *Bus. Law.* 1079, 1096-97 and n.102 (1982).

A fair reading of the legislative history indicates that Congressional concern was focused with particularity on numerical or percentage interest rates. In introducing S. 1988, Senator Pryor noted, "A national bank may charge one percent above the Federal discount rate, notwithstanding any State laws setting an interest-rate ceiling . . . [which] obviously discriminates in the strongest possible way against State banks." 125 *Cong. Rec.* 30655 (1979). The great bulk of the subsequent committee testimony and discussion indicates that the proposed preemption amendment was limited because, in Senator Pryor's words, it "would merely allow State chartered, federally insured banks . . . to charge the same interest rate as national banks." *Id.* In fact, there were only two references to wider displacement of state law though expansion of the "most-favored-lender doctrine." Senator Bumpers, co-sponsor of the preemption amendment, con-

fined his remarks to numerical interest rate disparities and remarked pointedly, "I do not think it is particularly healthy to be overriding state law." *Id.*

Post-DIDA legislative history tends to confirm the conclusion that Congress in 1980 did not intend to bar states from prohibiting late fees by credit-card issuers. In 1981 and in 1983-84 the Senate (but not the House) passed amendments to DIDA which would have expanded preemption of state usury laws, but would have expressly exempted late charges from preemption. *Greenwood Trust, supra,* 776 *F. Supp.* at 31 (citing *Hearings on S. 730 Before the Senate Committee on Banking, Housing and Urban Affairs,* 98th Cong., 1st Sess. (April 12, 1983); Hearings on S. 1720, 1981.[1] The failed S. 730 bill also expressly granted states the right to override preemption.

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[1] S. 730, the "Credit Deregulation and Availability Act of 1983," would have amended Title V of DIDA to provide, in relevant part, as follows:

> Sec. 531. The provisions of the constitution or laws of any State prohibiting, restricting, or in any way limiting the rate, nature, type, amount of, or the manner of calculating or providing or contracting for covered charges that may be charged, taken, received or reserved shall not apply to any extension of consumer credit made by the creditor.
>
> Sec. 532. (a) As used in this part—
>
> (1) The term "covered charges" means—
>
> (A) interest, discount, points, a time price differential, or any similar fees, charges, or other compensation paid to the creditor and arising out of the credit agreement or transaction for the use of credit or credit services. *The term shall not include, however, fees, charges or other amounts paid to the creditor or arising out of the credit agreement or transaction that are paid or arise solely as the result of the failure or refusal of the debtor to comply with the terms and conditions of the debtor's agreement with the creditor, including without limitation the fact that the obligation is not repaid in accordance with the payment schedule* . . . .
>
> [129 *Cong. Rec.* S. 17045-17046 (November 18, 1983) (emphasis added).]

Thus, the fact that Congress was specifically concerned about effecting a preemption limited to numerical interest rates is significant. If we cannot attribute to legislative initiative of 15 years ago the intent to include discrete, specialized charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier. That is especially so when the later statute substantially paralleled the language of the former, and it was passed in an effort to give federally-insured state banks status equal to national banks that had enjoyed a superior status since the enactment of the earlier act. Thus, it would be contrary to common sense to conclude that in enacting the NBA, Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance. Or that, correlatively, it intended to prohibit states from regulating specific terms and conditions of loans and preventing lenders from charging late-payment fees.

II

Defendant relies on case law from other jurisdictions to support its expansive interpretation of "interest", specifically, *Greenwood Trust, supra,* 971 *F.*2d 818 and *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992). We find, however, that the reasoning expressed in the *Greenwood Trust* line of cases and the authorities cited by the *Greenwood Trust* court are unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of interest.

Greenwood Trust held that prior case law supported the notion that federal common law construes interest to encompass a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate. 971 *F.*2d at 829 (citing *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.*2d 781,

787-88 (9th Cir. 1982); *Fisher v. First Nat'l Bank*, 548 *F.*2d 255, 258-61 (8th Cir. 1977); *Panos v. Smith*, 116 *F.*2d 445, 446-46 (6th Cir. 1940); *Cronkleton v. Hall*, 66 *F.*2d 384, 387 (8th Cir.), *cert. denied*, 290 *U.S.* 685, 54 *S. Ct.* 121, 78 *L. Ed.* 590 (1933); *Nelson v. Citibank (South Dakota) N.A.*, 794 *F. Supp.* 312, 318 (D. Minn. 1992)). Inimical to the holding in *Greenwood Trust*, a careful examination of the cases cited does not establish that Congress intended to include late-payment fees within a federal definition of interest under either section 85 or section 521.

Contrary to the *Greenwood Trust* court's interpretation, *American Timber & Trading Co., supra*, did not hold that a compensating-balance requirement was interest under section 85. Rather, the court held that a compensating-balance requirement reduces the principal amount of a loan for purposes of calculating effective interest. 690 *F.*2d at 787-88. In addition, *Fisher, supra*, did not expressly hold that cash-advance fees were interest under section 85. In that case, the plaintiff challenged the periodic interest and cash-advance fees charged by an out-of-state national bank. 548 *F.*2d at 256. The court applied the most favorable laws covering any class of lenders in the bank's home state, which permitted certain lenders to charge 30% interest on a balance under $300, and held that the charges were not usurious. *Id.* at 258-61. The court did not even discuss the distinction between periodic interest rates and the flat fees charged.

In *Panos, supra*, the court did not hold that mortgage taxes and recording fees were interest under section 85. Rather, the court held that such charges, which were deducted from the principal received by the borrower, reduced the principal amount of a loan for purposes of calculating effective interest. 116 *F.*2d at 446-47.

In *Cronkleton, supra*, the court did not conclude that a bonus or commission was interest under section 85. The Eighth Circuit's holding (in relevant part) was limited

to a modification of the district court's award of damages for usury under the NBA. The court's opinion does not provide a detailed account of the facts. However, it appears that in February 1926, the defendant, a national bank, loaned $55,000 to the plaintiffs. 66 *F.*2d at 385. The contractual periodic rate of interest was not usurious. *Ibid.* But, in November 1930, plaintiffs paid to the bank an additional $1,000. *Ibid.* Although the district court "made no findings as to bonuses paid," the court characterized the additional payment as a bonus or commission. *Id.* at 386. The court then noted that "in determining the rate 'reserved' or 'charged' . . . the taking of a 'bonus' or 'commission' . . . may enter in to render an otherwise lawful rate unlawful and usurious." *Id.* at 387.

The *Greenwood Trust* court suggested that *Nelson, supra,* decided three months earlier, held that late-payment fees were interest under section 85. 971 *F.*2d at 829. However, *Nelson* expressly disclaimed that conclusion. 794 *F. Supp.* at 320 ("the question of whether national banks may export terms other than periodic interest charges goes to the merits of the case; deciding that question on a motion to remand is inappropriate"). The court held only that the defendant's claim that section 85 preempted plaintiffs' state law claims raised a substantial federal question. *Id.* at 315-16.

The court in *Greenwood Trust* also cited several cases to support the proposition that section 85 "adopts the entire case law of [a state bank's home] state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state." 971 *F.*2d at 829 (citing *First Nat'l Bank v. Nowlin,* 509 *F.*2d 872, 876 (8th Cir. 1975); *accord Roper v. Consurve, Inc.,* 777 *F. Supp.* 508, 510-11 (S.D. Miss. 1990), *aff'd,* 932 *F.*2d 965 (5th Cir.) (table), *cert. denied,* —— U.S. ——, 112 *S. Ct.* 181, 116 *L. Ed.* 2d 142 (1991); *Daggs v. Phoenix Nat'l Bank,* 177 *U.S.* 549, 555, 20 *S. Ct.* 732, 735, 44 *L. Ed.* 882 (1900); *Union Nat'l Bank v. Louisville, N.A. & C. Ry.,* 163 *U.S.* 325, 331, 16 *S. Ct.* 1039,

1042, 41 *L. Ed.* 177 (1896); *Bartholomew v. Northampton Nat'l Bank*, 584 *F.*2d 1288, 1295 (3d Cir. 1978); *McAdoo v. Union Nat'l Bank*, 535 *F.*2d 1050, 1055-58 (8th Cir. 1976); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 *F.*2d 855, 861-64 (6th Cir. 1972)). Those cases, however, do not demonstrate that Congress intended to incorporate a state definition of interest that would authorize states unilaterally to incorporate non-percentage rate charges into an exportable definition under section 85. Moreover, none of those cases involve a definition of interest for exportation purposes where the definition varied between states.

Nowlin, supra, exemplifies the *Greenwood Trust* court's misplaced reliance on previous cases construing the NBA. In *Nowlin*, a national bank in Arkansas loaned money to the plaintiff, who agreed to repay the loan in installments. 509 *F.*2d at 874. Instead of amortizing the loan over the agreed term, the bank "discounted" the notes by 8%; that is, the bank gave the plaintiff the requested sum, but an additional 8% for every year of the notes' term was immediately added to the outstanding principal amount. *Ibid.* The plaintiff then had to repay the adjusted principal amount in equal payments over the term. *Ibid.* Because all interest was calculated up-front based on the initial loan amount, instead of being calculated periodically on a declining principal balance, the national bank achieved an effective yield of nearly 16%. *Ibid.*

The bank did not dispute that Arkansas considered usurious interest rates over 10%. *Id.* at 876. Furthermore, the bank did not dispute that a state bank could not "discount" notes in a like manner because Arkansas case law defined interest for purposes of its usury laws as "effective yield." *Ibid.* However, the bank argued that because it was a national bank, it was subject only to section 85, which defined interest narrowly to include only percentage rates charged, not effective yields. *Ibid.* Because its 8% discount rate was less than the 10%

Arkansas-usury rate, the bank argued that it did not violate the NBA. *Ibid.*

The court rejected the bank's arguments. After discussing the objectives of section 85, the court held that such a narrow interpretation would be inconsistent with Congress' desire to foster competitive equality between state and national banks. *Id.* at 880. Thus, the court held, Arkansas' definition of interest was incorporated into section 85. *Ibid.*

Contrary to the *Greenwood Trust* Court's conclusion, *Nowlin* does not offer an expanded definition of the term "rate," but rather shows only that calculation of chargeable interest rates must take "the case law of the state" into account. The state law regarding discounting was given substantial weight because discounting, unlike late-fee charges, directly affects the numerical interest rate by altering the percentage rate over time. It is noteworthy that the *Nowlin* decision involved the intra-state, not inter-state, application of Arkansas' definition of interest. Thus, it said nothing about exporting that definition to a foreign state where state-usury laws are more restrictive. Moreover, the case should be read as a judicial attempt to protect state usury laws at the expense of the federal most-favored-lender doctrine.

Defendant also refers, as does the dissent, to *Smiley v. Citibank, supra,* 44 *Cal. Rptr.*2d 441 (1995), to support its position that "interest" under section 85 includes late charges. *Post* at —— (slip op. at 4). Similar use is made of *Copeland v. MBNA America Bank, N.A., supra,* —— *Colo.* —— (1995). The majority in *Smiley* bases that conclusion in large measure on its understanding of historical legal usage. *Smiley, supra,* at 449-51. *See also Copeland, supra,* at —— (slip op. at 11-13) (same). In our view, however, interest in its historical setting is limited to a periodic charge expressed as a percentage of a principal balance due. See discussion, *supra,* at 25-28. The majority in *Smiley* also concluded that if

interest does not include late charges then a state could discriminate against a national bank to make it unprofitable for it to lend money in that state. *Smiley, supra,* at 451. However, a state cannot discriminate against a national bank by permitting state banks to charge late fees or higher late fees while prohibiting a national bank from charging those fees. See discussion, *infra* at 38-41. *See Smiley, supra,* at 470 (George, J., dissenting) (noting that it has been established since the early 1800's that even in the absence of a specific federal statutory prohibition a state may not discriminate against a federal instrumentality either in the enactment or enforcement of state laws). Thus, the most-favored-lender doctrine serves to eliminate discrimination without distorting or extending the meaning of interest to include charges that Congress neither expressly nor implicitly incorporated in the definition of interest.

III

Defendant, as well as the dissent, cites a recently-promulgated proposed interpretive ruling by the Office of the Comptroller of the Currency (OCC), the agency charged with enforcement of the NBA, as evidence that late fees constitute interest for purposes of the NBA. *Post* at —— (slip op. at 16). The soundness of this ruling, and its value as authority, are greatly undermined when placed in the context of conflicting OCC rulings.

It is well settled that in general an agency's interpretation of a statute it is charged with enforcing is entitled to substantial deference, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 *U.S.* 837, 843-45, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 703-04 (1984); *EPA v. National Crushed Stone Ass'n*, 449 *U.S.* 64, 83, 101 *S. Ct.* 295, 307, 66 *L. Ed.* 2d 268, 283 (1980) (citing *Udall v. Tallman*, 380 *U.S.* 1, 16, 85 *S. Ct.* 792, 801, 13 *L. Ed.* 2d 616 (1965)), and must in general be upheld even if that interpretation is not the only permissible one or even the most reasonable. *Grocery Town Market, Inc. v. United States*, 848 *F.*2d 392,

396 (3d Cir. 1988). There are, however, exceptions to the general rule.

Far less than the usual amount of deference to an agency interpretation is appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question. *INS v. Cardoza-Fonseca*, 480 *U.S.* 421, 446 n.30, 107 *S. Ct.* 1207, 1221 n.30, 94 *L. Ed.* 2d 434, 457 n.30 (1987) (citing *Watt v. Alaska*, 451 *U.S.* 259, 273, 101 *S. Ct.* 1673, 1681, 68 *L. Ed.* 2d 80 (1981); *General Elec. Co. v. Gilbert*, 429 *U.S.* 125, 143, 97 *S. Ct.* 401, 411-12, 50 *L. Ed.* 2d 343 (1976)).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 *U.S.* (1 Cranch) 137, 177, 2 *L. Ed.* 60 (1803). Statutory construction is ultimately a judicial function. *See, e.g., SEC v. Sloan*, 436 *U.S.* 103, 118, 98 *S. Ct.* 1702, 1712, 56 *L. Ed.* 2d 148, 161 (1978); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 *U.S.* 726, 745-46, 93 *S. Ct.* 1773, 1784-85, 36 *L. Ed.* 2d 620, 633-34 (1973). Indeed, "one of the Judiciary's characteristic roles is to interpret statutes." *Japan Whaling Ass'n v. American Catacean Soc'y*, 478 *U.S.* 221, 230, 106 *S. Ct.* 2860, 2866, 92 *L. Ed.* 2d 166, 179 (1986). Accordingly, the Supreme Court in *Chevron, supra*, did not state that silence or ambiguity in a statute automatically requires a court to delegate its entire interpretive responsibility to an agency, especially when an agency's interpretation is contrary to the purpose of the statute or inconsistent. *See West v. Bowen*, 879 *F.*2d 1122, 1138 (3d Cir. 1989) (Mansmann, J., concurring and dissenting).

Courts have found consistency or lack thereof in an agency interpretation to be crucial in determining the degree of deference to be afforded that interpretation. *See, e.g., INS v. Cardoza-Fonseca, supra* (rejecting deference to Board of Immigration Appeals due to years of inconsistent positions); *Director, Office of Workers' Compensation Programs v. Mangifest*, 826 *F.*2d 1318, 1319-

20 (3d Cir. 1987) (finding "ambiguities and inconsistencies in the Director's interpretation of . . . regulations . . . sufficiently great to preclude deference"); *Revak v. National Mines Corp.*, 808 *F.*2d 996, 1002 (3d Cir. 1986) (rejecting deference arguments due to inconsistent agency interpretation of statute); *Disabled in Action v. Sykes*, 833 *F.*2d 1113, 1117-19 (3d Cir. 1987), *cert. denied*, 485 *U.S.* 989, 108 *S. Ct.* 1293, 99 *L. Ed.* 2d 503 (1988). There is a great difference between flexibility and vacillation. Accordingly, judicial deference to administrative rulings should be cast on a sliding scale whereby the usual respect for agency determination diminishes as apparent inconsistencies surmount. *West, supra*, 879 *F.*2d at 1134 (Mansmann, J., dissenting and concurring).

The federal administrative understanding of the meaning of "interest" has wavered. *Cf. Copeland, supra*, —— *Colo.* at —— (slip op. at 13) (asserting that "[t]he OCC *consistently* has taken the position that late payment fees are interest" under both section 85 of the NBA and section 521 of the DIDA) (emphasis added). An examination of OCC interpretive letters reveals significant inconsistent administrative treatment of interest with respect to the NBA. As early as 1964, the OCC, responding to an inquiry to define interest under the NBA, stated that "late payment fees . . . would not properly be characterized as interest." *See* Letter by James J. Saxon, Comptroller of the Currency (June 25, 1964), Brief of Petitioner-Defendant at Ex C. (No. 38,817). Then, in 1986, the OCC was asked specifically whether late fees were considered interest that could be exported under section 85. Letter by Charles F. Byrd, Assistant Director, Legal Advisory Service (May 5, 1986), 1986 *WL* 143937 (O.C.C.). The agency opined that section 85 looks to state law to determine the maximum permissible interest rate, but that federal law determines which charges are "material" to the rate determination. *Id.* at *1. Because courts had not determined whether late fees were material, the OCC refused to provide the answer. *Ibid.*

In 1988, however, the OCC issued Interpretive Letter No. 452, which addressed whether various fees charged by an out-of-state national bank to its credit cardholder in Iowa were material to the determination of the interest rate under Section 85. Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1988). The agency concluded that whether particular fees are material to the interest rate determination under section 85 depends on the laws of a national bank's home state. *Id.* at 78,065-66 (citing Interpretive Ruling 7.7310, 12 C.F.R. § 7.7310(a)).

The OCC recently has affirmed that position. *See* Letter by Peter Liebsman, Assistant Director, Bank Operations and Asset Division (February 26, 1993), 1993 *WL* 501557 at *2 (the "1993 OCC Letter"). However, because the State failed to define "materiality", the 1993 OCC Letter stated that "characteristics of either the loan or the borrower . . . [that are] an integral part of a bank's decision to establish the rate of interest that will be charged" typically are material. *Id.* at *3. Notably, the OCC opined that charges such as "late fees, nonsufficient check charges, cash advance fees and attorney fees appear not to determine the numerical rate of interest to be charged." *Id.* at *4. Because such fees have only an "indirect effect on interest rates in that they may affect the ultimate return on loan proceeds," the agency suggested that absent their inclusion in the home-state's definition of interest, they would not be material, and thus, would not be exportable. *See ibid.*

The conflicting interpretations, coupled with the logic expressed in the "materiality" standard, convince us that this Court should not forsake its own considered reasoning by relying on an equivocation. It is the responsibility of Congress to depart from the traditional understanding of interest and to express an intent to include non-

numerical interest rates in its definition of "interest" under the NBA.

IV

New Jersey's banking statutes also reflect the basic understanding that the notion of interest was conceived and continues to be defined as specific percentage rates, rather than discrete charges, such as late fees, which are not directly related to borrowing money. *N.J.S.A.* 17:13A, which governs installment loan rate advertising, defines interest as follows:

> every charge paid to the lender or contracted for by the lender and the borrower in connection with or as an incident of a loan, whether designated as interest or as a financial charge or otherwise, *except that the term does not include the following charges when made pursuant to law: late or delinquency charges*; attorneys' and collection fees; insurance premiums, including premiums for credit life insurance; recording or filing fees, and all other charges which may lawfully be made on loans in addition to interest or finance charges.
>
> [*N.J.S.A.* 17:13A-2(g) (emphasis added).]

Other statutes distinguish late fees from interest by either authorizing or prohibiting certain lending institutions from making such charges. *N.J.S.A.* 17:13-104b specifically authorizes New Jersey credit unions to charge late fees to its members.

> Notwithstanding the provisions of R.S. 31:1-1 to the contrary, a credit union may charge, contract for, and receive interest on loans at a rate or rates agreed to by the credit union and the member. A *credit union may charge late fees* and lawful fees paid to any public officer for filing, recording, or releasing a document, and may charge collection fees, not to exceed 20% of the principle balance and interest outstanding, which may be added to the principal

> balance of any loan placed for collection after default thereon.
>
> [*N.J.S.A.* 17:13-104b (emphasis added).]

N.J.S.A. 17:9A governs a banking institution's authority to make check loans and other loans, *N.J.S.A.* 17:9A-59.1 to -59.17, small business loans, *N.J.S.A.* 17:9A-59.25 to -59.39 and loans secured by a deposit, *N.J.S.A.* 17:9A-59.40-63. In defining the amount of interest permitted on each class of loans, the respective statutes specifically include only percentage *rate* interest, not other financial charges. Other charges are provided for in separate sections. For example, *N.J.S.A.* 17:9A-59.6, sets the rate of interest for advance loans. Later provisions provide for additional fees on advance loans, such as late charges, *N.J.S.A.* 17:9A-59.7, and service charges, *N.J.S.A.* 17:9A-59.8.

On the other hand, New Jersey's RISA prohibits lenders from charging late fees and other financial charges in addition to interest. The statute provides:

> No retail seller, sales finance company, or holder shall charge, . . . directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with . . . retail charge accounts other than the charges permitted by this act . . . .
>
> [*N.J.S.A.* 17:16C-50.]

At the time this case was before the Court, the statute expressly authorized delinquency or late-payment charges on only retail installment contracts. *N.J.S.A.* 17:16C-42(a). On March 7, 1995, however, the statute was amended by *L.* 1995, *c.* 43, § 1, which specifically allows for late-payment charges on retail charge accounts. It provides in pertinent part that:

> The holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10 if provided for in the retail charge account agreement, on any minimum payment which has not been paid in full for a period of 10 days after its due date, as originally scheduled.
>
> [*L.* 1995, *c.* 43, § 1.]

The effective date of the amendment was May 29, 1995, 90 days following its enactment. *L.* 1995, *c.* 43, § 2. Thus, for purposes of this appeal, defendant's late-fee charges were still illegal under RISA. This amendment to the statute indicates, however, that the legislature did not intend to include late-fee charges within its definition of interest; rather, it expressly specified when and under what conditions other non-percentage rate charges could be procured by lenders in addition to annual interest rate charges.

Moreover, the regulations governing banking specifically provide for the maximum *rate* of interest to be charged on the issuance of different types of loans. *N.J.A.C.* 3:1-1.1; *N.J.A.C.* 3:1-1.2. These regulations governing interest say nothing about other financial charges, such as late fees. Thus, the manner in which both the Legislature and the Department of Banking have chosen to regulate lender-authorized charges clearly supports the conclusion that late fees are distinct from interest and thus not contained within the accepted definition of interest. The dissent incorporates late fees, and presumably other similar charges, into the notion of traditional interest by homogenizing what the Legislature has meticulously separated. It does so only by obscuring the clear language and structure of the legislative treatment of interest and late fees. *See Post* at —— (slip op. at 24-28).

The State Bank Parity Act, *N.J.S.A.* 17:13B-1 to -2, authorizes New Jersey banks to charge the same "rate of

interest" charged by credit unions. *N.J.S.A.* 17:13B-2 provides:

> Notwithstanding any provisions of R.S. 31:1-1 or any other statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a *rate* of interest on any class or type of loan at the rate of interest permitted to any other lender by the laws of this State on that class or type of loan.
>
> [*N.J.S.A.* 17:13B-2 (emphasis added).]

The Assembly Banking and Insurance Committee Statement that accompanied this legislation indicates that the act was intended as a state-bank companion to section 85 of the NBA.

> This legislation would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy . . . . In practice, a national bank may charge interest on any type of loan at the highest rate allowed to any lender in the state making any similar type of loan. Thus, in certain cases, national banks may now use the rate permitted to be charged by secondary mortgage loan licensees, small loan companies (this rate will now apply to bank credit cards because of legislation passed last year), or home repair contractors. This legislation, therefore, provides parity to state-chartered institutions.
>
> [Assembly Banking & Insurance Committee, *Statement to Assembly Bill No. 1986* (1981).]

Thus, while the Act provides for parity between the rates of interest charged by both banks and credit unions, the act does not explicitly authorize banks to charge other types of fees. Furthermore, there is no indication that the Legislature implicitly intended these other fees in the State Bank Parity Act. Indeed, the fact that the Legis-

lature has passed separate statutes that expressly authorize the imposition of discrete fees and charges, (see discussion, *supra,* at —— (slip op. at 24-28)), in contrast to interest, underscores the understanding that those types of charges are not contemplated by the State Bank Parity Act. The clearest indication of the Legislature's intent to distinguish between interest rates and late fees is in the language of its recent amendment to RISA, in which it expressly authorizes holders of retail charge accounts, as well as retail installment contracts, to charge late fees. The Legislature obviously enacted this law because it wanted to enable banks and other retail charge-account holders to charge late fees that credit unions were permitted to charge under *N.J.S.A.* 17:13-104b. Had the State Bank Parity Act provided parity between lenders as to specific non-interest rate charges, there would have been no need for the amendment because holders of retail charge accounts would have been entitled, pursuant to the parity act, to charge the late fees that credit unions were authorized to charge. Courts should avoid a construction that would render legislative enactments meaningless. *State v. Reynolds,* 124 *N.J.* 559 (1991). Thus, by excluding discrete charges from the parity act, the Legislature retained flexibility with respect to the non-percentage rate fees different lenders were permitted to charge their customers. For example, retail charge account holders are limited to a $10 late-fee per default period, while credit unions have no such limitation.

The language of RISA itself indicates the legislative intent to leave room for subsequent legislative initiatives to allow different lenders to make discrete non-percentage rate charges; it states that a retail seller, sales finance company or holder cannot charge additional fees or charges "other than the charges permitted by this act." Thus, the Legislature, in reserving within the statute the ability to authorize certain charges, has correctly recognized that there may be specific reasons for treating different lenders differently. For example, there may be

specific reasons for allowing a credit union, rather than a bank, to charge late fees. Credit unions are small, individualized lenders which do not cater to a large market. Furthermore, credit unions have a genuine social welfare purpose. In assisting their members they cannot spread costs like banks. Thus, they must be permitted to take actions, such as charging late fees, to help insure their solvency.

The dissent points to a letter from the Department of Banking to support its theory that the State Bank Parity Act includes late fees in its definition of interest. *Post*, at —— (slip op. at 27-28) (citing Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994)). Relying on an informal and isolated expression of agency interpretation has limited authoritative weight and does little to buttress its argument. Here, we are not presented with duly promulgated regulations that express legislative intent. *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 331 (1984) (emphasizing that procedural requirements for passage of rules, involving notice and public participation, are given authoritative weight). Nor are we confronted with even a course of regulatory conduct that reflects a clear and consistent administrative understanding as evidence of an underlying legislative intent. *Body-Rite Repair Co., Inc. v. Director, Div. of Taxation*, 89 *N.J.*, 540, 545-46 (1982) (holding that practical administrative construction of statute over period of years without interference by Legislature is evidence of conformity with legislative intent and should be given great weight by court). Clearly, a single letter from the Department of Banking does not constitute a settled or widespread course of administrative conduct that can be equated with the interpretive authority of a duly promulgated rule. Moreover, it cannot provide a meaning that is neither expressed in the statute, nor in the legislative scheme governing banking. Our deference does not go so far as to permit an administrative agency under the guise of an administrative in-

terpretation to give a statute any greater effect than is permitted by statutory language. *In re Adoption of N.J.A.C. 7:26B*, 128 *N.J.* 442, 450 (1992) (citation omitted).

This Court has found no legislative authority to support the contention that interest in the context of either the State Bank Parity Act or the NBA encompasses a variety of lender-imposed fees and financial requirements that are independent of a numerical percentage rate. Thus, we can conclude only that neither Congress, in passing the NBA, nor the New Jersey Legislature, through its own parity act, intended to include late fees in its definition of interest for the purpose of preventing discrimination against out-of-state lenders.

V

Defendant argues that although the new RISA amendment is inapplicable to the charges assessed in this case, the fact that New Jersey credit unions were permitted to charge late fees at the time defendant procured those fees, pursuant to the most-favored-lender doctrine, entitled out-of-state national banks, like defendant, to charge late fees. We disagree.

Although a national bank may "borrow" the interest rate from any lending institution in its home state, without regard to whether that institution is actually "competitive" with a national bank, a national bank is not authorized to charge late fees simply because a state credit union is so authorized in a state other than its home state. Inter-state parity, as established in *Marquette*, is commonly identified as the notion that a national bank is entitled to export the interest authorized by its home state to borrowers located in other states that authorize a lower interest rate. *Marquette, supra*, 439 *U.S.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. The defendant seeks to extend this inter-state parity notion by arguing that a foreign national bank lending to customers in New Jersey is entitled to charge the interest authorized by the state in which the bank is located *or* the interest authorized in New Jersey, whichever is higher, and that for purposes

of determining what interest can be exported, all of the extra charges authorized by the borrower's state can be included as well. Thus, it argues a foreign national bank can charge late fees because New Jersey credit unions are permitted to charge them and, under the most-favored-lender doctrine, national banks can charge the same interest—in its most expansive form—as any state lender. The argument, we find, overreaches the federal statutory scheme.

Section 85 of the NBA provides in pertinent part:

> Any [national bank] association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, *interest at a rate allowed by the laws of the State, Territory, or District where the bank is located,* or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except where by the laws of any State a different rate is limited for banks organized under state laws, *the rate so limited shall be allowed for associations organized or existing in any such state* under this chapter.
>
> [12 *U.S.C.A.* § 85 (emphasis added).]

Section 86 reads in pertinent part:

> The taking, receiving, reserving or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest . . . In case the greater rate of interest has been paid, the person by whom it has been paid, . . . may recover back, . . . twice the amount of the interest thus paid . . . .
>
> [12 *U.S.C.A.* § 86.]

For purposes of section 85, a national bank is located either in the place designated in its organizational cer-

tificate or in the places in which it has established authorized branches. *Marquette, supra,* 439 *U.S.* at 309 n.21, 99 *S. Ct.* at 546 n.21, 58 *L. Ed.* 2d at 542-43 n.21. A plain reading of the statute and most cases interpreting it indicate that a national bank is permitted to charge the interest rate of the state in which it is located, *not* the interest rate of the state in which the out-of-state consumer is located. *Id.* at 301, 99 *S. Ct.* at 542, 58 *L. Ed.* 2d at 537-38 (ruling that section 85 authorizes a national bank based in one state to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home state, when that rate is greater than that permitted by the state of the bank's nonresident customers); *Cades v. H & R Block, Inc.,* 43 *F.*3d 869, 874 (4th Cir. 1994) (determining that Delaware law applied to fix the interest rate when the bank located in Delaware, even though the loan occurred in South Carolina; "section 85, which looks to the interest rates allowed by the state where the bank is located—not where the borrower is located or where the loan transaction may be said to have occurred").

Moreover, there is some indication that it is illegal for a national bank to charge interest in excess of that amount permitted in its home state. In *Panos v. Smith, supra,* 116 *F*2.d 446, the court read sections 85 and 86 together to find that the NBA forbids a national bank to collect a higher rate of interest than is permitted by the law of the state in which it is located. Although none of these cases specifically dealt with a situation where the interest in the state of the customer was higher or more permissive than the national bank's home state, the basic understanding that resort to the higher level of interest would not be allowed is readily inferable from their treatment of the subject.

The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or

using her "lender credit card" partakes in a transaction in the national lender's home state. *See Marquette, supra,* 439 *U.S.* at 318-19, 99 *S. Ct.* at 550, 58 *L. Ed.* 2d at 548 (recognizing that impairment of state usury laws "has always been implicit in the structure of the National Bank Act, since citizens of one state were free to visit a neighboring state to receive credit at foreign interest rates"); *Schumacher v. Lawrence, supra,* 108 *F.*2d 576 577 (6th Cir. 1940) (stating that the question whether the rate of interest charged by a national bank is usurious is decided according to the law of the state in which the transaction occurs); *Haas v. Pittsburgh Nat'l Bank,* 60 *F.R.D.* 604, 608 n. 3 (W.D.Pa. 1973) (same); *Fisher v. First Nat'l Bank, supra,* 548 *F.*2d at 257 ("A[n] [Iowa] customer using this "lender credit card" . . . communicates or indicates his intention to establish the credit card arrangement with BankAmericard when the lender, through banking channels, receives in the State of Nebraska the draft of the customer."). It is clear that Congress intended that the NBA and DIDA immunize national banks and out-of-state federally insured banks that lend money beyond their home-state's borders from local usury laws that might give local banks a competitive advantage. *E.g., Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64 (holding that Congress, by enacting NBA intended to protect national banks from hostile state usury laws); *Sherman,* 272 *N.J. Super.* at 440 (same); *Hunter,* 272 *N.J. Super.* at 530 (same); 12 *U.S.C.A.* 1831d(a) (permitting State-chartered insured depository institutions to charge interest rates permitted in their home state "[i]n order to prevent discrimination against State-chartered insured depository institutions"). Thus, the statutes were intended to prohibit states from forcing national banks to charge a lower rate of interest to customers located outside of the national bank's home state than they would be permitted to charge their customers located in the home state.

We do not believe prohibiting national lenders from charging the rate of interest permitted by the laws of a foreign state would be considered discrimination when the national bank was not organized in that state and would not be able to charge higher interest rates except by taking advantage of the laws of the foreign state. New Jersey's RISA does not conflict with the most-favored-lender doctrine in this case, and thus New Jersey should be permitted to prohibit out-of-state lenders from charging late-fees to New Jersey residents, because, at the outset of this case, New Jersey banks were also prohibited from charging those fees. This finding would enable state usury laws to remain vital and controlling over non-interest rate credit terms. Consumer credit protection is a fundamental local interest, long recognized by Congress, and it thus should not be displaced by the sweeping preemption urged by defendant.

Because at the time of this appeal, RISA prohibited both New Jersey and national retail charge account holders from charging late fees, we hold that defendant's late-fee charges violated this state's usury laws and are thus impermissible.

VI

Although the late-fee charges at issue in this case are impermissible under the RISA statute as it existed when those fees were assessed, we acknowledge, as suggested by the parties, that such charges assessed after May 29, 1995 do not appear to be illegal under that statute. As earlier discussed, *supra* at —— (slip op. at 28-29), the Legislature amended the statute to permit "the holder of any retail charge account [to] collect a delinquency or collection charge" of no more than $10. *L.* 1995, *c.* 43, § 1. Pursuant to the statute, a "holder" is "any person, including a retail seller, who is entitled to the rights of a seller under a retail installment contract or retail charge account." *N.J.S.A.* 17:16C-1(m). A "retail charge account" is

> any account . . . established by agreement which prescribes the terms under which a retail buyer may from time to time purchase or lease goods or services which are primarily for personal, family or household purposes, and under which the unpaid balance thereunder, whenever incurred is payable in one or more installments and under which a time price differential may be added in each billing period as provided herein. Retail charge account also includes all accounts arising out of the utilization by the holder of a credit card . . . issued by a sales finance company, giving the holder the privilege of using the credit card . . . to become a retail buyer in transactions out of which debt arises.
>
> [*N.J.S.A.* 17:16C-1(r).]

Although the statute does not expressly include banks within these definitions, clearly banks have for years been performing the functions attributable to holders of retail charge accounts. *See N.J.S.A.* 17:3B-4 to -28 (Market Rate Consumer Loan Act) (authorizing New Jersey banks to offer revolving credit plans at an interest rate agreed to by lender and borrower); *N.J.S.A.* 17:9A-59.1 (permitting advance loans by banks). In fact, the statute expressly provides that "any banking institutions authorized to do business in this State, shall be authorized to transact business as a sales finance company." *N.J.S.A.* 17:16C-2. Thus, it appears that the Legislature intended to include banks that issue credit cards within those institutions authorized to assess late charges on overdue charge accounts. Therefore, a bank may contract to charge the delinquency fee on the same basis as any other "holder of any retail charge account" in New Jersey.

Nothing in the statute indicates a legislative intention to allow state banks to charge delinquency fees while prohibiting national banks and federally-insured state banks from assessing those fees. In fact, the statute defines

banking institutions generally as "any bank, national banking association, savings bank or federally chartered savings bank authorized to do business in this State". *N.J.S.A.* 17:16C-1(n). There is no distinction between a national banking association and an association under state laws except where the distinction is specifically made by Congress. *Anderson v. First Nat'l Bank*, 54 *F. Supp.* 937 (D.Idaho 1944). States may not discriminate against national banks with respect to general contract terms or charges. *See Anderson Nat'l Bank v. Luckett*, 321 *U.S.* 233 (1944) (national banks are subject to state laws unless those laws infringe upon national banking laws or impose undue burden on performance of bank's functions); *National State Bank v. Long*, 630 *F.*2d 981, 985 (3d Cir. 1980). Thus, national banks, as well as federally-insured state banks, are permitted to charge the late fees authorized by statute to the same extent as state banks.

However, New Jersey retains the authority to regulate on a non-discriminatory basis all non-interest rate contractual terms and conditions of a bank as a holder of a retail charge account. The Supreme Court has held that state law controls a bank's right to collect its debts.

> [National banks] are governed in their daily course of business far more by the laws of the State than of a nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.
>
> [*National Bank v. Commonwealth*, 6 *U.S.* (9 Wall) 353, 362, 19 *L. Ed.* 70 (1870).]

Thus, it would appear that a national bank and a federally-insured state bank may, as of May 29, 1995, charge a delinquency fee in accordance with the authorization now given by the statute. *See L.* 1995, *c.* 43.

VII

The judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Stein and Coleman join in Justice Handler's opinion. Justice Pollock has filed a separate dissenting opinion in which Justice Garibaldi joins. Justice O'Hern has also filed a separate dissenting opinion.

POLLOCK, J., dissenting.

This appeal poses the question whether a national bank located in South Dakota may impose a late charge on a credit-card customer who resides in New Jersey, if South Dakota permits the charge, but New Jersey does not. More specifically, the appeal focuses on whether the definition of "interest" in the National Bank Act (NBA), 12 *U.S.C.A.* § 85 (section 85), includes late charges, and, if so, whether that statute preempts the New Jersey Retail Installment Sales Act of 1960, *N.J.S.A.* 17:16C-1 to -94 (RISA).

In a class-action complaint brought on behalf of himself and other Citibank credit cardholders, petitioner, Marc Sherman, asserts that the RISA precludes defendant, Citibank (South Dakota), N.A. (Citibank), a national banking association located in South Dakota, from imposing late charges on cardholders located in New Jersey. The Law Division granted Citibank's motion to dismiss the complaint with prejudice. The Appellate Division affirmed. 272 *N.J. Super.* 435. The majority reverses. I dissent.

-I-

Because the appeal arises from the grant of Citibank's motion to dismiss, I accept as true all facts alleged in the complaint. *See Bozza v. Vornado, Inc.*, 42 *N.J.* 355, 357-58 (1964). Sherman alleges that in 1989 Citibank sent to him at his New Jersey residence an application, Visa card, and Card Member Agreement. The record, however, does not include copies of these instruments. According to the complaint, the annual precentage-rate finance charge (periodic interest) is 19.8 percent. In addition, a cardholder who does not make the minimum payment within twenty-five days of the due date is subject to a fixed late-payment fee regardless of the amount of the outstanding balance or delinquent payment. Twice Sherman was late in making his monthly payment. Each time, Citibank imposed a late charge.

Sherman claims that the late charges violate various provisions of New Jersey's Consumer Fraud Act, *N.J.S.A.* 56:8-2 and -19, and of the RISA, *N.J.S.A.* 17:16C-50 and -54. The Fraud Act prohibits undisclosed late charges, and the RISA prohibits delinquency charges on revolving credit accounts. He also claims that the late fees constitute a common-law breach of contract and conversion. All claims depend on whether Citibank may impose late charges as interest.

The initial task is to determine the meaning of "interest" in section 85. That section permits national banks to charge borrowers "interest at the rate allowed by the laws of the State . . . where the bank is located." 12 *U.S.C.A.* § 85. South Dakota, the state where Citibank is located, defines "interest" to include late charges: "Interest is the compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation . . . charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit." *S.D. Codified Laws Ann.* § 54-3-1 (1995). Citibank claims that as a South Dakota bank it may impose late charges on defaulting customers whether those customers are located in South Dakota, New Jersey, or anywhere else.

Sherman, however, relies on the RISA, which permits credit-card issuers to charge periodic interest, but not late fees: "No retail seller, sales finance company, or holder shall charge, . . . directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with . . . retail charge accounts . . . ." *N.J.S.A.* 17:16C-50. He claims that "interest" in section 85 refers to periodic interest, but not to late charges. Consequently, he denies that the RISA conflicts with the NBA.

-II-

Initially dividing the majority and the dissent is the meaning of the word "interest" as used in the NBA. Both agree that "interest" includes periodic interest, the amount paid for the use of money calculated as a percentage of the sum due for a stated period, typically one year. That definition, however, is not exhaustive. The meaning of the word becomes indeterminate at the margins. Webster's Dictionary, for example, accords "interest" seven definitions, six with subparts. Definition 3(a) defines "interest" as "the price paid for borrowing money generally expressed as a percentage of the amount borrowed paid in one year . . . ." *Webster's Third New International Dictionary* (1976). The use of the adverb "generally" suggests the existence of other definitions. So construed, accepted usage recognizes that "interest" may include charges other than periodic interest. Consistent with that construction, the Supreme Court of California recently concluded that dictionary definitions of "interest" "then current in American legal usage" at the time of the passage of the NBA are broad enough to include late charges. *Smiley v. Citibank (South Dakota) N.A.*, 44 *Cal. Rptr.* 2d 441, 450-51 (1995).

More relevant than the meaning that lexicographers assign to statutory terms is the meaning assigned by the Legislature. To bridge the gap between dictionary definitions and legislative intent, the California Supreme Court apparently assumed that Congress consulted the dictionaries cited in *Smiley*. Dictionaries, however, are not essential to the judicial search for the meaning of statutory terms. *Cabnell v. Markham*, 148 *F.*2d 737, 739 (2d Cir. 1945). To illustrate, when deciding that "interest" in the NBA includes late charges, the Colorado Supreme Court recently concluded "that the common dictionary definitions are not sufficiently precise to settle the question before us." *Copeland v. MBNA America, N.A.*, —— *Colo.* —— (1995) (slip op. at 9).

Absent an express statutory definition, courts may glean the meaning of legislative language from sources such as statutory history, purpose, and structure. In ascertaining the meaning of a statutory term, a court's task is not to create its own definition, but to ascertain the definition intended by the Legislature. *E.g., Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n,* 499 *U.S.* 117, 128, 111 *S. Ct.* 1156, 1163, 113 *L. Ed.* 2d 95, 106-07 (1991); *Roig v. Kelsey,* 135 *N.J.* 500, 515 (1994). The NBA does not expressly define "interest." Nor does a fair reading of the legislative history of the statute disclose the intended meaning of that term. Accordingly, I search elsewhere for the word's meaning in the NBA.

The early history of national banking sheds some light on congressional intent in the NBA. Before enacting the NBA, Congress twice had treid unsuccessfully to create a Bank of the United States. Each time, however, states'-rights advocates defeated attempts to renew the Bank's charter. *See* John J. Knox, *A History of Banking in the United States* 35-48, 51-71 (1900) (discussing creation and dissolution of Bank of the United States and Second Bank of the United States); Bray Hammond, *Banks and Politics in America* 197-226, 369-450 (1957) (same). Then, in 1864, responding to the economic turmoil created by the Civil War, Congress adopted the NBA. Among other things, the NBA re-established a system of national banks. *See* Knox, *supra,* at 91-111 (discussing NBA); Hammond, *supra,* at 718-34 (same). To overcome local prejudice in favor of state banks, Congress included section 85. By mandating interest-rate parity in section 85, Congress sought to provide a level playing field for national banks throughout the United States. *See* Knox, *supra,* at 235-69. Although helpful, the history of the NBA is not dispositive of the meaning of interest in the NBA. *Copeland, supra,* —— *Colo.* at —— (slip op. at 10).

The United States Supreme Court first construed section 85 in *Tiffany v. National Bank of Missouri,* 85 *U.S.* (18

Wall.) 409, 21 *L. Ed.* 862 (1873). The plaintiff Tiffany, challenged the legality of the ten-percent interest rate charged to Missouri borrowers by the defendant, National Bank of Missouri. Missouri's usury laws limited to eight percent the interest rate that state-chartered banks could charge, but allowed non-bank lenders to charge interest at a rate of ten percent. *Id.* at 411, 21 *L. Ed.* at 863. Reasoning that section 85 permitted the defendant national bank to charge interest at a "rate allowed by the laws of [Missouri]", the Court held that the bank could charge the highest interest rate that could be charged by any lender in that state. *Id.* at 411-13, 21 *L. Ed.* at 863-64. In so holding, the Court required states to treat national banks as a "most favored lender." *Id.* at 413, 21 *L. Ed.* at 864. Although the Court acknowledged that its holding might disadvantage state-chartered banks, it relied on the overriding congressional intent to create a strong national banking system immune from unfriendly state legislation. *Id.* at 412-13, 21 *L. Ed.* at 863-64. "National banks," the Court declared, are "national favorites." *Id.* at 413, 21 *L. Ed.* at 864.

Over a century later, the Court revisited section 85 in *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S. Ct.* 540, 58 *L. Ed.* 2d 534 (1978). The plaintiff, Marquette National Bank of Minnesota (Marquette), challenged the interest rate charged by a Nebraska national bank to Minnesota credit cardholders. Minnesota law prohibited banks in that state from charging more than twelve percent on credit-card balances, but allowed them to charge an annual fee up to $15. *Id.* at 302-03, 99 *S. Ct.* at 542-43, 58 *L. Ed.* at 538. Nebraska law, however, allowed banks to charge up to eighteen percent on outstanding credit-card balances below $1,000. *Id.* at 302, 99 *S. Ct.* at 542, 58 *L. Ed.* 2d at 538. First National Bank of Omaha (Omaha Bank), a national bank chartered in Nebraska, charged eighteen percent interest on outstanding balances of Minnesota credit cardholders. *See id.* at 304, 99 *S. Ct.* at

543, 58 *L. Ed.* 2d at 539. Marquette claimed it was losing customers to Omaha Bank because "Marquette was forced by the low rate of interest permissible under Minnesota law to charge a $10 annual fee for the use of its credit cards." *Ibid.*

The Court determined that although the cardholders lived and made credit-card purchases in Minnesota, Omaha Bank was "located" in Nebraska. *Id.* at 310-13, 99 *S. Ct.* at 546-48, 58 *L. Ed.* 2d at 543-45. Consequently, Omaha Bank could charge the favorable Nebraska rate to its customers in Minnesota. *Id.* at 313-14, 99 *S. Ct.* at 548, 58 *L. Ed.* 2d at 545. As in *Tiffany, supra,* 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64, the Court noted the clear congressional intent to favor national banks, even at the expense of state banks. *Marquette Nat'l Bank, supra,* 439 *U.S.* at 314-18, 99 *S. Ct.* at 548-50, 58 *L. Ed.* 2d at 545-48.

Although *Tiffany* and *Marquette* discussed permissible rates of interest under section 85, they did not define "interest." Recent federal decisions, however, illuminate the meaning of interest in section 85. *See Greenwood Trust Co. v. Massachusetts,* 971 *F.* 2d 818 (1st Cir. 1992), *cert. denied,* —— *U.S.* ——, 113 *S. Ct.* 974, 122 *L. Ed.* 2d 129 (1993); *Tikkanen v. Citibank (South Dakota), N.A.,* 801 *F. Supp.* 270 (D. Minn. 1992).

Greenwood Trust involved a federally-insured state bank chartered in Delaware that issued credit cards throughout the United States, including Massachusetts. 971 *F.* 2d at 821. The bank, Greenwood Trust Company, imposed late charges on its delinquent credit-card customers. Delaware law, like South Dakota law, characterizes late charges as "interest." *Id.* at 829. The state claimed that Massachusetts' consumer-protection law, like the RISA, prohibited late charges. *Id.* at 821. Greenwood Trust argued, however, that by reference to the law of Delaware, the Depository Institutions Deregulation and Monetary Con-

trol Act of 1980 (DIDA) authorized it to charge late fees as interest.

Section 521 of the DIDA grants the same protection to federally-insured state banks that section 85 of the NBA provides to national banks. Section 521 provides that any federally-insured state bank may,

> notwithstanding any State constitution or statute which is hereby preempted for the purpose of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State . . . where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A.* § 1831d(a).]

The United States Court of Appeals for the First Circuit ruled that under section 521 Greenwood Trust could charge its Massachusetts cardholders the highest interest rate allowed by Delaware law. *Greenwood Trust, supra,* 971 *F.* 2d at 827. The court determined that both Delaware's express statutory provision, *Del. Code Ann.* tit. 5, § 950 (1994), and federal common law support a broad definition of "interest" that includes late fees. 971 *F.* 2d at 829-30 (citing *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.* 2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement); *Fisher v. First Nat'l Bank,* 548 *F.* 2d 255, 258-61 (8th Cir. 1977) (cash-advance fee); *Panos v. Smith,* 116 *F.* 2d 445, 446-47 (6th Cir. 1940) (mortgage, taxes, and recording fees); *Cronkleton v. Hall,* 66 *F.* 2d 384, 387 (8th Cir.) (bonus or commission), *cert. denied,* 290 *U.S.* 685, 54 *S. Ct.* 121, 78 *L. Ed.* 590 (1933); *Nelson v. Citibank (South Dakota) N.A.,* 794 *F. Supp.* 312, 318 (D. Minn. 1992) (late

fees)). Thus, the court concluded that for purposes of section 521, "interest" includes late fees, and that Greenwood Trust could "export" those charges authorized by Delaware law to Massachusetts. *Greenwood Trust, supra,* 971 *F.* 2d at 831.

The vast majority of state and federal courts have followed *Greenwood Trust. E.g., Ament v. PNC Nat'l Bank,* 849 *F. Supp.* 1015 (W.D. Pa 1994); *Watson v. First Union Nat'l Bank,* 837 *F. Supp.* 146 (D.S.C. 1993); *Goehl v. Mellon Bank,* 825 *F. Supp.* 1239 (E.D. Pa. 1993); *Smiley, supra,* 44 *Cal. Rptr.* 2d at 453; *Stoorman v. Greenwood Trust Co.,* 888 *P.* 2d 289 (Colo. Ct. App.), *rehearing denied,* —— *Colo. Ct. App.* —— (1994), *cert. granted,* —— *Colo.* —— (1995); *Copeland, supra,* —— *Colo.* ——; *Sherman, supra,* 272 *NJ. Super.* 435; *Hunter v. Greenwood Trust Co.,* 272 *N.J. Super.* 526 (App. Div. 1994).

Tikkanen, supra, 801 *F. Supp.* 270, reached the same conclusion under section 85 as *Greenwood Trust* had reached under section 521. In *Tikkanen,* which is virtually identical to this appeal, the plaintiff argued that section 85's definition of interest was restricted to numerical periodic interest rates and did not include late-payment charges authorized by Souht Dakota, the defendant national bank's home state. 801 *F. Supp.* at 277 The federal district court held, however, that interest under section 85 was not limited to percentage-rate charges and could include fixed late fees. *Id.* at 276-78. Although the court did not announce a federal definition of interest that included late fees, it held that if a national bank's home state defines interest to include such fees, then the bank may "export" those fees under section 85. *Id.* at 279.

Rejecting the *Greenwood Trust* and *Tikkanen* line of cases, lower courts in Pennsylvania have held that "interest" does not include late-payment fees. *Mazaika v. Bank One, Columbus, N.A.,* 653 *A.* 2d 640 (Pa. Super.

1994), *appeal granted*, 659 *A*.2d 557 (Pa. 1995); *Gadon v. Chase Manhattan Bank*, 653 *A*. 2d 697 (Pa. Super. 1995) (following *Mazaika*). One United States District Court has reached a similar conclusion. *Copeland v. MBNA America, N.A.*, 820 *F. Supp.* 537 (D. Colo. 1993) (denying federal jurisdiction based on complete preemption defense because "ordinary meaning" of interest does not encompass late fees).

In *Mazaika, supra*, 653 *A*. 2d at 646, a Pennsylvania intermediate appellate court stated that "[i]t would appear beyond peradventure that the plain and ordinary meaning of the term 'interest' or 'interest rate' does not include late fees, . . . or the like which are not levied on a percentage basis." I find, however, that the meaning of "interest" and "rate of interest" are not as plain as the *Mazaika* court found them. As the OCC has concluded, *infra* at 16-17, interest could include all charges for the "use or forbearance of money," including late fees. *See Brown v. Hiatts*, 82 *U.S.* (15 Wall.) 177, 185 , 21 *L. Ed.* 128, 131 (1872).

—III—

The modern history of banking has been one of expanding regulation. Banks are subject to regulation by multiple federal agencies. The Comptroller of the Currency, 12 *U.S.C.A.* § 1; the Federal Housing Finance Board, 12 *U.S.C.A.* § 422a; the National Credit Union Administration, 12 *U.S.C.A.* § 1752a; the Federal Deposit Insurance Company, 12 *U.S.C.A.* § 1811; the Office of Thrift Supervision, 12 *U.S.C.A.* § 1462a; and the Board of Governors of the Federal Reserve System, 12 *U.S.C.A.* § 248, all regulate various aspects of banking. In addition, banks often are subject to dual regulation by state banking authorities.

With banking, as with other heavily-regulated commercial activities, Congress has recognized that it cannot maintain an efficient regulatory system through constant

recourse to the legislative process. *See* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.1 (3d ed. 1994) ("It is impossible to draft a statute with sufficient precision and foresight to resolve each of the hundreds of issues that are likely to arise during the life of the statute."); Cass R. Sunstein, *Law and Administration after Chevron*, 90 *Colum. L. Rev.* 2071, 2088 (1990) ("Congress is unable to amend every statute to account for . . . changes . . . ."). Consequently, it has authorized administrative agencies to implement specific congressional objectives. When Congress delegates authority to an administrative agency, the judicial role is not to pass on the wisdom of an agency's decision, but to assure that the agency has not abused its delegated authority. Davis & Pierce, *supra*, at § 3.3; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 516; Richard J. Pierce, Jr., *Chevron & Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 *Vand. L. Rev.* 301, 307-08 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *Yale J. on Reg.* 283, 300-04 (1986).

Absent clear indicia of legislative intent, courts often look for guidance to the administrative agency entrusted with the regulation of matters covered by a statute. *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 *U.S.* ——, ——, 115 *S. Ct.* 810, 813-14, 130 *L. Ed.* 740, 748 (1995); *Chevron, U.S.A., Inc. v. NRDC*, 467 *U.S.* 837, 842-44, 104 *S. Ct.* 2778, 2781-83, 81 *L. Ed.* 2d 694, 702-03 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 102 *S. Ct.* 2355, 2361, 72 *L. Ed.* 2d 728, 736 (1982); *Lammers v. Board of Educ.*, 134 *N.J.* 264, 274 (1993); *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313, 327 (1984). In *Nationsbank of North Carolina, N.A., supra*, 513 *U.S.* at ——, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 747, the United States Supreme Court recently reiterated:

> " 'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of those laws.' " *Clarke v. Securities Industry Ass'n*, 479 *U.S.* 388, 403-404, 93 *L. Ed.* 2d 757, 107 *S. Ct.* 750, 771-72 (1987) (quoting *Investment Company Institute v. Camp*, 401 *U.S.* 617, 626-627, 28 *L. Ed.* 2d 367 91 *S. Ct.* 1091 (1971)).

In *Chevron*, the United States Supreme Court developed a two-part test for determining whether deference to an agency interpretation of a statute is appropriate. First, the statute that the agency purports to interpret must be unclear. 467 *U.S.* at 842-43, 104 *S. Ct.* at 2781-82, 81 *L. Ed.* 2d at 703. When Congress has not defined an important statutory term, courts fairly can presume that Congress intended the agency to provide a definition. *Id.* at 843-44, 104 *S. Ct.* at 2782, 81 *L. Ed.* 2d at 703; *see also* Davis & Pierce, *supra*, at § 3.3 (discussing *Chevron* and presumption of congressional delegation); Scalia, *supra*, at 516-17 (same).

In 1864, Congress may not have contemplated specifically that banks would issue credit cards or even that interest would include late fees. Even so, I believe that Congress intended to delegate to the OCC the authority to implement the goals of the NBA. Also likely, Congress intended that in meeting those goals the OCC would adapt to the changing needs of banks and their customers. That adaptation foreseeably includes administrative changes in the definition of "interest." In brief, I believe that federal banking regulators are in a better position than state courts to define the meaning of "interest" in the NBA. That conclusion, in my opinion, also represents sound public policy. On a matter so essential to the national economy as the meaning of "interest" in federal banking legislation,

the nation is better served by judicial deference to the judgment of Congress and the banking regulators.

The second part of the *Chevron* test directs courts to defer to reasonable agency interpretations. 467 *U.S.* at 844-45, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704; *see also* Davis & Pierce, *supra,* at § 3.3; Scalia, *supra* at 516-18. Implicit in the notion of reasonableness is discretion in choosing among alternatives. In defining "interest" to include late charges, the OCC has made a reasonable choice among possible definitions of interest. Of course, if Congress should disagree with the agency's interpretation, it retains the authority to redefine the term. *See, e.g., CFTC v. Schor,* 478 *U.S.* 833, 845-46, 106 *S. Ct.* 3245, 3254, 92 *L. Ed.* 2d 675, 689 (1986) (suggesting that Congress's failure to overrule agency supports conclusion that agency definition comports with congressional intent).

The OCC consistently has determined that late-payment and certain other non-periodic fees are interest for purposes of section 85 of the NBA. In a recent interpretive letter, the agency concluded that a federal definition of "interest" under section 85 includes late fees. Letter by Julie L. Williams, Chief Counsel (Feb. 17, 1995), 1995 *WL* 419824 (O.C.C.). Earlier letters, although relying on the law of the national bank's home state, reached the same conclusion. *See* Letter by William P. Bowden, Jr., Chief Counsel (Feb. 4, 1992), 1992 *WL* 136390 (O.C.C.) at *9-*11 (concluding that state law determines fees material to definition of interest) (the Bowden Letter); Letter by Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of Currency [1988-89 Transfer Binder] *Fed. Banking L. Rep.* (CCH) ¶ 85,676 at 78,063 (Aug. 11, 1988) (same) (the Serino Letter); Letter by Charles F. Byrd, Assistant Director, Legal Advisory Services (May 5, 1986), 1986 *WL* 143937 (O.C.C.) at *3 (concluding that state law determines maximum interest rate). *But see* Letter from Peter Liebesman, Assistant Director, Bank Operations and Assets Division (Feb. 26, 1993),

1993 *WL* 501557 (O.C.C.) at *9 (suggesting in *dicta* that late fees are not material to definition of interest absent state law conclusion to contrary). In sum, the OCC consistently has concluded that if a state allows any lender to charge interest in the form of late-payment fees, a national bank located in that state may charge those fees to its out-of-state borrowers.

To confirm that interest, for purposes of the NBA, includes late fees, the OCC recently promulgated proposed Interpretive Ruling § 7.4001 for inclusion in the Code of Federal Regulations. 60 *Fed. Reg.* 11924, 11940 (1995) (to be codified at 12 *C.F.R.* 7.4001) (proposed March 3, 1995). The proposed ruling states:

> The word "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for any extension of credit, the making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, . . . numerical periodic rates, late fees, not sufficient funds fees, overlimit fees, annual fees, cash advance fees, and membership fees.

If adopted, the proposed ruling would further evidence the OCC's conviction that late fees are interest. The majority's cavalier dismissal of the proposed ruling, *ante* at —— (slip op. at 22), fails to consider the ruling's significance.

The agency's definition of "interest," as expressed in its interpretive letters, is clear. The judicial task is to determine whether that interpretation is reasonable. *Nationsbank, supra,* 513 *U.S.* at ——, 115 *S. Ct.* at 813, 130 *L. Ed.* 2d at 748; *Chevron, supra,* 467 *U.S.* at 843-44, 104 *S. Ct.* at 2782-83, 81 *L. Ed.* 2d at 704. In its February 17, 1995, interpretive letter, *supra,* the OCC documented early federal case law that defined "interest" as the "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as dam-

ages for its detention." *Brown, supra,* 82 *U.S.* (15 *Wall.*) at 185, 21 *L. Ed.* at 131. The letter then concludes that late-payment fees, which legitimately compensate lenders for increased lending costs and risks associated with delinquent borrowers, are interest.

The OCC's conclusion is reasonable. It permits a national bank to charge any fees related to the use of money, if those charges are authorized by the bank's home state. That concept of parity comports with the NBA's goal of preventing discrimination against national banks. No principled reason confines the NBA to periodic interest rates.

Contrary to the protestations of the majority, *ante* at —— (slip op. at 22-26), the evolution of the OCC's analysis does not render its opinion unworthy of judicial deference. *Chevron* counsels that an agency's change in a policy determination is not necessarily entitled to less respect because of the change. *See* 467 *U.S.* at 863-64, 104 *S. Ct.* at 2792, 81 *L. Ed.* 2d at 715-16; Scalia, *supra,* at 517-19 (discussing *Chevron's* rejection of consistency requirement); Starr, *supra,* at 297-98 (same). Although the agency's analysis may have evolved over time, the analytical path has consistently led to the conclusion that national banks may export late fees. Late charges, moreover, are sufficiently close to the essence of "interest" to justify the OCC's decision to include them within the meaning of the word. The prototypical definition of "interest" as periodic interest is broad enough to encompass late charges. *See generally* Lawrence M. Sloan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?,* 73 *Wash. U. L.O.* 1069 (1995) (discussing definitional and prototypical interpretations of statutory language). I accept the conclusion of the banking regulators that interest for purposes of the NBA may include late charges and other fees charged by lenders in connection with a loan.

-IV-

-A-

Having determined that section 85's definition of "interest" includes late fees, the next question is whether that definition preempts the RISA's prohibition against the imposition of such fees. More specifically, the question is whether Congress intended that the NBA, as interpreted by the OCC, should preempt state law.

Congress may preempt a state law by expressly stating that it so intends, *e.g., Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, ——, 112 *S. Ct.* 2608, 2617, 120 *L. Ed.* 2d 407, 422-23 (1992); by occupying an enitre field of regulation, *e.g., Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S. Ct.* 1146, 1152, 91 *L. Ed.* 1447, 1459 (1947); or by enacting a federal statute that conflicts with a state law, *Hillsborough County, supra,* 471 *U.S.* at 713, 105 *S. Ct.* at 2375, 85 *L. Ed.* 2d at 721; *Maryland v. Louisiana*, 451 *U.S.* 725, 747, 101 *S. Ct.* 2114, 2129, 68 *L. Ed.* 2d 576, 596 (1981).

Section 85 does not contain an express preemption clause. Given the dual regulation of banking by state and federal regulators, Congress may not have occupied completely the field of banking regulation. The question becomes whether section 85's definition of "interest," which permits national banks to impose late fees, conflicts with the RISA's prohibition of such fees.

My analysis begins with the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> [*U.S. Const., art.* VI, *cl.* 2.]

Ever since *Gibbons v. Ogden*, the Supremacy Clause has mandated preemption of state laws that "interfere with, or are contrary to the laws of Congress . . . ." 22 *U.S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1825). Notwithstanding the supremacy of federal law, the United States Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 *U.S.* ——, ——, 115 *S. Ct.* 1671, 1676, 131 *L. Ed.* 2d 695, 704 (1995); *see Maryland, supra*, 451 *U.S.* at 747, 101 *S. Ct.* at 2129, 68 *L. Ed.* 2d at 595; *Rice, supra*, 331 *U.S.* at 230, 67 *S. Ct.* at 1152, 91 *L. Ed.* at 1459. The Court, however, has found conflict to be preemptive when "compliance with both federal and state [laws] is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 *U.S.* 132, 142-43, 83 *S. Ct.* 1210, 1217-18, 10 *L. Ed.* 2d 248, 257 (1963). It likewise has recognized preemption of state law when that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 *U.S.* 52, 67, 61 *S. Ct.* 399, 404, 85 *L. Ed.* 581, 587 (1941). Preemption is not foreclosed, however, merely because a federal statute displaces a traditional subject of state regulation. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 *U.S.* 141, 153, 102 *S. Ct.* 3014, 3022, 73 *L. Ed.* 2d 664, 675 (1982); *Greenwood Trust, supra*, 971 *F.* 2d at 828. To constrict unduly a federal statute to avoid interference with a state law would subvert the Supremacy Clause.

Against that background, the question recurs whether section 85, which permits a national bank to impose a late fee, and the RISA, which prohibits such a fee, are in conflict. In one sense, to state the question is to answer it. When state law prohibits an act that federal law permits, the conflict is apparent. True, section 85 does not

mandate that national banks must charge late fees. The problem arises only when the national bank seeks to impose a late fee. By foregoing late fees, Citibank could avoid the conflict. That analysis, however, begs the question.

As with ascertaining the meaning of "interest," I find guidance on the question of preemption in the rulings of the OCC. In her February 17, 1995, letter, *supra*, OCC Chief Counsel Julie Williams ruled:

> [W]e reaffirm our previous conclusion that "interest" permitted under section 85 may be charged without reference to whether all or part of it is permissible under the laws of the state where the customer resides. If the law of the state where the customer resides is different from the law of the state in which the bank is located, the former law has no effect on what the bank may charge as "interest."

Accord the Bowden Letter, *supra*; the Serino Letter, *supra*; *see also* Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 92-47, *Fed. Banking L. Rep.* (CCH) ¶ 81,534 at 55,730-31 (July 8, 1992) (reaching same conclusion under section 521); Letter by Douglas H. Jones, Deputy General Counsel, FDIC No. 93-27, *Fed. Banking L. Rep.* (CCH) ¶ 81,635 at 55,838-39 (July 12, 1993) (same).

Admittedly, an agency statement according a preemptive effect to a statute is not as persuasive as an express statutory clause. Given the pervasive role that Congress has entrusted to federal banking regulators, however, I would respect consistent regulatory rulings on preemption. *City of New York v. FCC*, 486 *U.S.* 57, 64, 108 *S. Ct.* 1637, 1642, 100 *L. Ed.* 2d 48, 57 (1988) ("[I]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care . . . , we should not disturb it unless it appears . . . that the accommodation is not one that Congress would have sanctioned.' ") (quot-

ing *U.S. v. Shimer*, 367 *U.S.* 374, 383, 81 *S. Ct.* 1554, 1560, 6 *L. Ed.* 2d 908, 915 (1961)).

Federal supremancy in the regulation of credit-card interest charges also makes sense. In many respects, credit cards have replaced the national currency. Residents of one state regularly make credit-card purchases from mail-order retailers in other states. Similarly, they use credit cards to charge meals, lodging, transportation, and other expenses when traveling throughout the nation and the world. Credit cardholders, moreover, can change their state of residence. Given the mobility of credit cardholders and transactions, federal regulation incorporating a bank's home-state's law is reasonable. The majority recognizes as much. It writes: "The theory of the NBA, as applied by federal and state courts, is that the borrower's state usury laws can be discarded because the customer either taking out a loan or using her 'lender credit card' partakes in a transaction in the national lender's home state." *Ante* at — (slip op. at 37).

-B-

Close analysis of New Jersey law, moreover, reveals that the RISA impermissibly interferes with the congressional goal of preventing states from discriminating against national banks. *Tiffany, supra*, 85 *U.S.* at 412-13, 21 *L. Ed.* at 863-64. Although the RISA prohibits certain lenders from imposing late fees on delinquent borrowers, various statutory provisions expressly authorize other lenders to charge such fees. For example, *N.J.S.A.* 17:13-104b expressly authorizes credit unions to charge late fees: "A credit union may charge late fees . . . not to exceed 20% of the principal balance and interest outstanding . . . ." Similarly, *N.J.S.A.* 17:16C-42(b), *L.* 1995, *c.* 43, § 1, as recently amended, provides that "[t]he holder of any retail charge account may collect a delinquency or collection charge in an amount not to exceed $10 . . . ." Moreover, *N.J.S.A.* 17:9A-59.7 authorizes banks to charge late fees on advance loans.

Thus, some New Jersey lenders are authorized expressly to charge late fees.

In 1981, the New Jersey Legislature enacted the State Bank Parity Act (the Parity Act), *N.J.S.A.* 17:13B-1 to -2, which is modelled after section 85. The Parity Act provides: "Notwithstanding any . . . statute to the contrary, any bank, savings bank, savings and loan association or credit union may charge a rate of interest . . . permitted to any other lender by the laws of this State . . . ." *N.J.S.A.* 17:13B-2.

If late fees are interest under the Parity Act, then any New Jersey bank may charge them. On that premise, the RISA would prohibit only national and out-of-state banks, such as Citibank, from charging late fees. That result would discriminate against out-of-state national banks that lend money to New Jersey borrowers. A state law that discriminates against out-of-state national banks conflicts directly with Congress's goals, and, therefore, is preempted.

The possibility of that conflict raises the question whether late fees are "interest" for purposes of the Parity Act. Title 17, which governs financial institutions, does not expressly define the term. The relevant New Jersey statutes send inconsistent signals on the question whether the definition of interest excludes late fees. For example, N.J.S.A. 17:13-104(b), the same provision that authorizes credit unions to charge late fees, also authorizes credit unions to charge interest. Similarly, holders of retail charge accounts may charge interest under *N.J.S.A.* 17:16C-40 and late fees under *N.J.S.A.* 17:16C-42. Furthermore, *N.J.S.A.* 17:9A-59.6 discusses interest rates on advance loans, and *N.J.S.A.* 17:9A-59.7 authorizes late fees on those loans.

Although New Jersey statutes apparently distinguish annual interest and late fees, I cannot ignore the Legislature's unequivocal statement that it enacted the Parity Act as a corollary to section 85. The Assembly Banking

and Insurance Committee Statement that accompanied the Parity Act declared that the Act

> would give state chartered banks, savings banks, savings and loan associations, and credit unions the same "most-favored-lender" authority that national banks presently enjoy. By the provision of 12 *U.S.C.* 85, national banks may take interest at the rate allowed by the laws of any state . . . . The [OCC], who supervises national banks, has interpreted this to mean that national banks may charge interest not only at the rate permitted by state law to banking institutions, but also at the rate for a similar type of loan made by any licensed lender. . . . This legislation, therefore, provides [similar] parity to state-chartered institutions.

In the Parity Act, the Legislature intended to grant state banking institutions the same benefits that national banks enjoy under the NBA, as construed by the OCC. Under the Parity Act, therefore, state banks, like national banks, may charge late fees as interest.

The New Jersey Department of Banking has concluded that because late fees are interest under the NBA, they are interest for the purposes of the Parity Act. *See* Letter from Francis P. Carr, Assistant Commissioner, Department of Banking (Oct. 14, 1994). Although informally expressed, the assistant commissioner's letter is the department's only expression of its understanding of the meaning of interest in the Parity Act. Both the state and federal legislative schemes rely on regulation by administrative agencies. Because the Legislature has entrusted the department with the regulation of state banks, the department's interpretations of state banking laws are entitled to judicial deference. *Lammers, supra,* 134 *N.J.* at 274.

Admittedly, the Legislature has not drawn distinct lines; it could have expressed its intent more definitively. We

are remitted to finding the Legislature's intent in a statutory mosaic. The majority sees one picture. I see another.

I conclude that the definition of interest in the Parity Act includes late fees. Under the Parity Act, because credit unions and retailers may charge late fees, "any bank, savings bank, [or] savings and loan association" chartered in New Jersey also may charge such fees.

Because state-chartered banks may charge late fees to New Jersey customers, a state law, such as the RISA, that prohibits out-of-state national banks from charging such fees would constitute impermissible discrimination in violation of the Supremacy Clause. In sum, I would hold that the NBA conflicts with, and thus preempts, the RISA.

-V-

Interestingly, the majority concludes that in the future out-of-state national banks may impose limited late-payment fees on New Jersey cardholders. The Court so concludes because the 1995 amendment to *N.J.S.A.* 17:16C-42, *L.* 1995, *c.* 43, § 1, extends the right to charge late fees of up to $10 to holders of retail charge accounts. For me, however, the source of a national bank's authority to impose late fees is not the RISA, but the NBA. By declaring that the RISA determines the amount of the late fees that a national bank may charge, the majority has inverted the Supremacy Clause so that state law trumps federal law. The need for uniform regulation of national banks, not misplaced notions of federalism, should prevail.

Ultimately dividing the majority and dissent are differing perceptions of the roles of Congress, federal banking regulators, and state courts in regulating national banks. The majority takes a position reminiscent of states'-rights advocates who opposed federal regulation of interstate commerce and of national banks. Banking, however, is integral to the national economy. Credit cards and other innovations such as electronic money transfers have con-

verted consumer lending from a local to a national activity. In that context, the need for federal control is paramount. Until such time as Congress explicitly determines whether interest includes late charges, I would defer to the judgment of the OCC.

-VI-

My colleague, Justice O'Hern, reaches the same result as do I, but through a different analysis. He proceeds from the major premise that the NBA expresses a general congressional intent, apart from the terms of the statute, that states must not favor state banks over national banks. *Post* at — (slip op. at 1). His minor premise is that New Jersey law permits lenders to impose late charges as interest. *Id.* at — (slip op. at 4). From this, he concludes that by permitting New Jersey banks, but not national banks, to impose such charges, New Jersey law violates the NBA.

My problem with his analysis is with its divination of congressional intent apart from the terms of the statute. For me, the reason that the NBA trumps RISA is that section 85 expressly permits national banks to charge "interest at the rate allowed by the laws of the State . . . where the bank is located." "Interest," as previously explained, includes late charges. Close examination of the authorities cited by Justice O'Hern reveals that they rely not on metaphysical notions of congressional intent, but on the specific words of the statute. *Post* at — (slip op. at 3-4). I also find misplaced his concern that Congress did not intend states to "export" their "consumer protection attitudes" to other states. *Id.* at — (slip op. at 7).

The mischief hides in the term "export." When a South Dakota national bank charges interest, including late fees, as allowed by that state to a borrower in New Jersey, the charge is legal because the NBA expressly allows it, not because South Dakota is "exporting" its interest rate to New Jersey. The authority for the imposition of the

charge is not South Dakota law, but the NBA. Congress has defined the standard to measure the allowable rate of interest; that standard is interest as allowed by the national bank's home state. As Citibank's home state, South Dakota merely provides the point of reference. Only in a metaphorical sense is South Dakota "exporting" its rate of interest. In reality, a national bank may impose interest as allowed by its home state because Congress has so ordained.

For the preceding reasons, I respectfully dissent.

Justice Garibaldi joins in this dissent.

O'HERN, J., dissenting.

I agree with the majority that the National Bank Act does not preempt state consumer protection laws that prohibit late charges on credit card accounts. I would, however, allow national banks to assess late charges against credit card holders in New Jersey, not because the late charges are interest under the National Bank Act (they are not) and not because Congress has authorized the Comptroller of the Currency to preempt the State's consumer protection law, but because New Jersey law permits lenders to impose such late charges and may not discriminate against national banks that seek to impose the same charges.

In 1864 Congress enacted the National Bank Act, *c.* 106, 13 *Stat.* 99 (NBA). Section 85 of the NBA now provides that any national bank

> may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State * * * where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater * * *.
>
> [12 *U.S.C.A.* § 85.]

In addition to addressing interest rate differentials between state and national lending institutions, the NBA had a more profound purpose and effect—to assure that national banking institutions were never put at any economic disadvantage in competition with state-chartered institutions.[1]

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[1] Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980, *Pub. L.* No. 96-221, 94 *Stat.* 132, authorize other federally insured depository insti-

Before the Civil War, Jacksonian distrust of concentrated power of mercantile interests had brought about the demise of national banks and the rise of the state banking systems. *Clarke v. Securities Indus. Ass'n*, 479 *U.S.* 388, 413, n.5, 107 *S. Ct.* 750, 764, n.5, 93 *L. Ed.* 2d 757, 777, n.5 (1987) (Stevens, J., concurring).

> Enactment of the National Bank Act was part of Congress's attempt to induce state-chartered banks to convert to national charters in order to achieve several federal objectives, such as the development of a national currency, the creation of a market for federal bonds to finance the war, and the use of national banks as depositories.
>
> [Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 *Geo. Wash. L. Rev.* 676, 699 (1983).]

If state-chartered banking institutions were permitted to make loans on more favorable terms than nationally chartered institutions, then nationally chartered institutions would be at an economic disadvantage. Congress "deliberately settled upon a policy intended to foster 'competitive equality' " between national banks and state banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 *U.S.* 122, 131, 90 *S. Ct.* 337, 342, 24 *L. Ed.* 2d 312, 318 (1969) (quoting *First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 *U.S.* 252, 261, 87 *S. Ct.* 492, 497, 17 *L. Ed.* 2d 343, 349 (1966)). In the *Walker Bank* case, involving branch banking issues, the Court wrote: "To us it appears beyond question that the Congress was continuing its *policy of equalization* first adopted in the National Bank Act of 1864." 385 *U.S.* at 261, 87 *S. Ct.* at 497, 17 *L. Ed.* 2d at 349 (emphasis added).

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tutions to collect interest as allowed by the laws of the state in which they are located. Those provisions generally confer on federally insured state banks the privileges that national banks enjoy under the NBA. For convenience of analysis, I refer only to the federally chartered institutions.

Because equalization, not presumption, is the congressional policy, New Jersey cannot grant late-charge privileges to its financial institutions and not to national banks:

> The purpose of section 85 is [1] to adopt the state law, relating to interest rates permitted, to permit national banks to charge the rate of interest allowed to competing lenders in the state, *and* [2] to guard against unfriendly federal-state legislation or ruinous competition with state chartered or licensed lenders. This interpretation of Section 85, commonly referred to as "the most favored lender policy" puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders. The statute prevents state legislation which purports to give state banks or possibly any state lender advantages over national banks.
>
> [*United Missouri Bank of Kansas City, N.A. v. Danforth*, 394 *F. Supp.* 774, 779 (W.D. Mo. 1975) (emphasis added).]

The New Jersey Department of Banking reasons that state-chartered credit unions "are authorized to offer credit cards and charge late charges without limit." (Letter from Francis P. Carr, Assistant Commissioner, New Jersey Department of Banking, to Dennis R. Casale 1 (Oct. 14, 1994) (citing *N.J.S.A.* 17:13-105(c)). Thus, even though late charges are not interest, a national bank must be permitted to impose late charges as long as a state lender may impose them. *See Saul v. Midlantic Nat'l Bank/South*, 240 *N.J. Super.* 62, 81 (App. Div.) (recognizing that under "most favored lender" doctrine, national banks may make loans on same terms as state-chartered credit union), *certif. denied*, 122 *N.J.* 319 (1980).

In addition, *S.* 1412, signed into law on March 7, 1995, amended the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C-1 to -61, the statute on which plaintiffs

have based their claims in this case. The 1995 amendment expressly authorizes the holder of any retail charge account to collect flat late charges. *N.J.S.A.* 17:16C-42. After that amendment there can be no question that a nationally chartered credit card lender may not impose such late charges, at least to the extent allowed under *S.* 1412. Were it otherwise, Citibank explains, there would be favoritism shown to state lenders:

> The favored lender, by contracting for flat, contingent charges from late payers, can protect itself against risks and costs associated with delinquencies while keeping monthly percentage charges low to attract good customers who are consistently punctual. The disfavored lender, who cannot collect late charges, tends to get all the customers who anticipate paying late and tends to lose the customers with strong credit and habits of punctuality because it must impose higher monthly percentage charges to make up for its inability to impose late charges.

That competitive advantage cannot be given to the state-chartered institutions. *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 *F.*2d 855, 863 (6th Cir. 1972), held that because a Michigan-chartered savings and loan association was permitted to charge a borrower (in addition to interest) the closing costs of a real estate loan, a national bank could legally impose such additional charges. The *Northway Lanes* court quoted a principal drafter of the NBA, Senator John Sherman of Ohio, who explained that the purpose of the NBA was "to confer on these national banks the same privileges that are conferred by the laws of the State on other associations and individuals * * * [and] to place the national banks in each state on precisely the same footing with individuals and persons doing business in the state by its laws." 464 *F.* 2d at 861 (quoting *Cong. Globe,* 38th Cong. 1st Sess. 2126 (1863)).

"National banks have been national favorites." *Tiffany v. National Bank of Missouri*, 85 *U.S.* (18 Wall.) 409, 413, 21 *L. Ed.* 862, 864 (1874). The NBA confers on them *"at least competitive equality"* with other lenders and a "possible advantage over state banks in the field of interest rates." *Fisher v. First Nat'l Bank of Omaha*, 548 *F.*2d 255, 259 (8th Cir. 1977) (emphasis added). No state may create a competitive disadvantage by favoring any class of state lenders over national lenders, as New Jersey would favor its state lenders if they alone can impose late charges. An Opinion Letter from the Office of the Comptroller of the Currency explains:

> [I]f a state allows state banks to charge credit card annual fees at flat rates, then section 85 allows national banks to do so as well. If national banks were not allowed to match state-regulated lenders on these flat loan charges, then the "most favored lender" principle would be destroyed.
>
> [Letter from Julie L. Williams, Chief Counsel, to John L. Douglas (Feb. 17, 1995), 1995 WL 71676 (OCC), *6.]

Plaintiffs seek to avoid the application of the "most favored lender" doctrine by arguing that The Credit Union Act, *N.J.S.A.* 17:13-73.1 to -125, did not always authorize unlimited late fees on retail charge cards, insisting that the more specific provisions of RISA controlled retail credit card transactions. Plaintiffs' interpretation of the law is of little consequence as long as the State regulators continue to permit state-chartered lenders to impose late charges. The NBA forbids precisely that form of discrimination against national banks.

States have a profound interest in their consumer protection laws. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 *U.S.* 299, 314, 99 *S. Ct.* 540, 548, 58 *L. Ed.* 2d 534, 545-46 (1978), held only that "interest rates of one State [can be] 'exported' into

another" because a literal application of the plain language of "rate allowed" in Section 85 compelled that result. Only a distorted reading of Section 85 would allow exportation of the consumer protection attitudes of the home state of the national bank. See William G. Bornstein, Comment, *Extension of the Most Favored Lender Doctrine Under Federal Usury Law: A Contrary View*, 27 *Vill. L. Rev.* 1077, 1107-08 (1981-82) (analyzing the *Marquette* holding).

I cannot imagine that Congress intended that South Dakota or Delaware be permitted to export their concepts of consumer protection and to preempt and nullify the consumer protection laws of New Jersey. I therefore agree with that portion of the Court's opinion.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MARC SHERMAN, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Defendant-Respondent.

Argued Jan. 27, 1994

Decided April 22, 1994

Before Judges SHEBELL, LONG and LANDAU.

The opinion of the court was delivered by

LONG, J.A.D.

Plaintiff, Marc Sherman, here appeals from the trial judge's dismissal of the class action he filed against defendant, Citibank (South Dakota), N.A. to invalidate the late charges defendant imposed upon him in connection with a credit card it had issued to him.

I

Defendant is a nationally chartered bank association located in Sioux Falls, South Dakota. It actively solicits New Jersey consumers to apply for and accept its Visa and

Mastercard credit cards through direct mailings and multimedia advertisements.

Sometime in 1989, plaintiff received a Visa credit card which defendant had mailed to him at his New Jersey residence. At the same time, he received a Cardmember Agreement. This agreement was not included in the record. However, defendant does not dispute that it provided for a late fee to be imposed if a cardholder fails to pay the designated minimum monthly payment by the late payment due date. This fee is in addition to the interest which accrues on the unpaid balance and is listed separately on a cardholder's statement. Plaintiff and defendant dispute the amount of the late charge. Plaintiff says it is a $15 flat fee; defendant says it is a $6 flat fee for accounts unpaid over fifteen days plus one-half percent per month.

Between the date plaintiff received his credit card and December 1991, he did not always pay the minimum monthly installment due on his account as stated on his monthly billing statements. As a result, his succeeding monthly billing statements reflected the imposition of at least two separate late charges. These fees are prohibited by New Jersey law.

Plaintiff filed a consumer class action against defendant on behalf of himself and all residents of New Jersey who hold credit cards issued by defendant or have done so in the past and have been charged a delinquency charge or late fee in connection with those credit cards. In it he asserted four claims: (1) violation of *N.J.S.A.* 56:8-2 and -19, for defendant's failure to disclose in its advertising and in its agreements with credit cardholders that New Jersey law prohibits late fee charges; (2) violation of *N.J.S.A.* 17:16C-50 and -54, which prohibit delinquency charges on revolving credit accounts, for defendant's collection of late fees; (3) breach of contract for assessing late fees that are not reasonably related to defendant's costs; and (4) conversion.

Defendant moved to dismiss the amended complaint. At the close of oral argument, the motion judge, Judge Fratto, dismissed plaintiff's complaint on the ground that the National Bank Act preempted New Jersey law relative to the subject of interest. An order to this effect was entered from which plaintiff filed a timely notice of appeal. On appeal, plaintiff argues that his state law claims are not preempted by section 85 of the National Bank Act because the late charges at issue are not interest. We have carefully reviewed this record in light of this contention and have concluded that there is no warrant for our intervention.

II

In 1864, Congress enacted the National Bank Act (NBA) *ch.* 106, 13 *Stat.* 99 (codified, as amended, in scattered sections of the United States Code). Section 85 of the NBA states in relevant part that:

> [a]ny association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .
>
> [12 *U.S.C.A.* § 85.]

The intent of section 85 was to protect national banks from discriminatory state banking laws. *See Greenwood Trust Co. v. Massachusetts*, 971 *F.*2d 818, 826 n. 6 (1st Cir.1992), *cert. denied*, —— *U.S.* ——, 113 *S.Ct.* 974, 122 *L.Ed.*2d 129 (1993). By permitting national banks to charge interest at the rate allowed by a state's law or at a rate tied to the local federal discount rate, Congress prevented states from favoring state-chartered banks to the

detriment of national banks as to the amount of interest that could be charged on bank loans. *Ibid.*

Ten years after the NBA was enacted, the United States Supreme Court construed section 85 in *Tiffany v. National Bank*, 85 *U.S.* (18 Wall.) 409, 21 *L.Ed.* 862 (1873). There, the Court announced what became known as the "most favored lender" doctrine, under which national banks could not be placed at a competitive disadvantage with respect to *any* state-regulated lender. Specifically, *Tiffany* allowed a national bank to charge interest rates chargeable by natural persons under Missouri law. 85 *U.S.* at 413, 21 *L.Ed.* at 863-64. The "most favored lender" doctrine has subsequently been interpreted to give national banks the same interest rate privileges as any competing state institutions, including small loan companies and retail installment sellers. *See, e.g., Fisher v. First Nat'l Bank*, 538 *F.*2d 1284, 1289-90 (7th Cir. 1976), *cert. denied*, 429 *U.S.* 1062, 97 *S.Ct.* 786, 50 *L.Ed.*2d 778 (1977).

In 1936, the Comptroller of the Currency issued an interpretation of section 85 which administratively recognized the "most favored lender" doctrine as part of federal banking law. *See* Barkley Clark, *The Law of Bank Deposits, Collections and Credit Cards*, ¶ 11.09, at 43 (3d ed. 1990). The "most favored lender" doctrine was later formally incorporated into the Comptroller's regulations covering national banks. 12 *C.F.R.* § 7.7310(a) (1993).

The margins of the most favored lender doctrine were later tested in *Marquette National Bank v. First of Omaha Service Corp.*, 439 *U.S.* 299, 99 *S.Ct.* 540, 58 *L.Ed.*2d 534 (1978). There, First National Bank of Omaha, a national bank chartered in Nebraska, where the allowable interest rate ranged up to eighteen percent on outstanding credit card balances, attempted to "export" that rate to Minnesota, where it had solicited BankAmericard customers and where the allowable interest rate was only twelve percent. *Marquette Nat'l Bank*, 439 *U.S.* at 302-

304, 99 *S.Ct.* at 542-43, 58 *L.Ed.*2d at 538-39. Minnesota law permitted credit card issuers within its borders to charge an annual usage fee to cardholders to compensate for the relatively low rate of allowable interest. *Id.* at 303, 99 *S.Ct.* at 542, 58 *L.Ed.*2d at 538-39. A national bank located in Minnesota, Marquette National Bank, brought an action to enjoin First of Omaha from soliciting business in and from "exporting" interest rates to Minnesota, asserting that it was losing BankAmericard customers to First of Omaha because Minnesota's low twelve-percent interest rate compelled it to charge its cardholder-customers a ten-dollar annual fee for use of the card. *Id.* at 304, 99 *S.Ct.* at 543, 58 *L.Ed.*2d at 539. The Minnesota-based national bank was rebuffed by the Minnesota Supreme Court and appealed.

The United States Supreme Court determined that the case was governed by section 85, and ruled that a national bank may charge interest on any loan at the rate allowed by the state where the bank is located. *Id.* at 313-19, 99 *S.Ct.* at 547-50, 58 *L.Ed.*2d at 544-48. The Court unanimously held that First of Omaha could charge its Minnesota customers the interest rate allowed under Nebraska law, even though that rate was greater than the rate allowed in Minnesota for a Minnesota-based national bank. *Id.* at 318-19, 99 *S.Ct.* at 550-51, 58 *L.Ed.*2d at 547-48. *Marquette* effectively permitted a national bank to "export" its home state's interest rates on credit-card accounts to other states.

The question presented here is whether the late charge imposed by Citibank is exportable interest within the meaning of *Marquette* and the most favored lender doctrine. A number of recent federal decisions persuasively reason that late charges are interest within the meaning of federal law. *Greenwood* actually presented the question of whether a state bank which was chartered in Delaware and insured by the Federal Deposit Insurance Corporation could assess its Massachusetts credit card cus-

tomers the late penalties permitted by Delaware law but proscribed by Massachusetts. 971 *F.*2d at 821-22. The First Circuit Court of Appeals was presented with a problem similar to that at issue here because the Delaware bank was governed by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), Pub.L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of the U.S. Code). *Greenwood, supra,* 971 *F.*2d at 822. Section 521, codified at 12 *U.S.C.A.* § 1831d(a), allows insured state institutions to charge interest "at a rate not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater." As *Greenwood* found, DIDA essentially incorporated section 85 into the legislation governing federally-insured state banks, in order to achieve parity between state and national banks. *Id.* at 826-27. According to *Greenwood*, the principle of exportation is as firmly embedded in section 521 as in section 85. The Court concluded that, under *Marquette*, the Delaware bank was permitted to export late fees, which were included within Delaware's definition of interest. *Id.* at 829. In reaching this conclusion, *Greenwood* construed several pre-*Marquette* section 85 cases as holding that interest under the federal statute could encompass late charges and similar fees. *Id.* at 829-30 (citing *Fisher v. First Nat'l Bank*, 548 *F.*2d 255, 258-61 (8th Cir.1977) (fee for cash advance); *Panos v. Smith*, 116 *F.*2d 445, 446-47 (6th Cir.1940) (taxes and recording fees) and *Cronkleton v. Hall*, 66 *F.*2d 384, 387 (8th Cir.) (bonus or commission paid to lender), *cert. denied*, 290 *U.S.* 685, 54 *S.Ct.* 121, 78 *L.Ed.* 590 (1933)).

Tikkanen v. Citibank, (South Dakota), N.A., 801 *F. Supp.* 270, 278-79 (D.Minn.1992) engaged in an analysis which is directly applicable here. There, the District

Court granted summary judgment in favor of a national bank in a suit where a group of Minnesota plaintiffs alleged that late fees were not interest under section 85 and could not be assessed by out-of-state national banks against Minnesota residents. Relying on *Fisher v. First National Bank,* 548 *F.*2d 255 (8th Cir.1977), *Tikkanen* rejected the argument that the term "interest" under section 85 encompasses only a periodic percentage rate of interest and reasoned that section 85 mandates that whatever usury laws apply to state-chartered lenders pertain to national banks located in the state. *Id.* at 276-78. If the home state of a national bank defines late fees as interest, that bank may assess such fees and, under *Marquette,* export them to other states. *Id.* at 278-79.

Tikkanen recognized that a consequence of combining a broad definition of interest with *Marquette's* exportation principle is that national banks may locate in states with liberal credit laws to circumvent consumer protection laws enacted in other states. *Id.* at 276. However, it specifically rejected the plaintiffs' suggestion that the most favored lender doctrine should only be applied to allow a national bank to borrow a state interest rate (or fee) with respect to *intrastate* transactions but not to allow the bank to export that rate. *Id.* at 277. Nothing in section 85 supports a definition of interest which varies with intrastate vs. interstate activity. *Ibid.*

Several of the other recent decisions cited by the parties also support the trial judge's conclusion although they represent interim decisions on motions for removal by banks whose late fees were challenged or, conversely, motions by plaintiffs to remand their actions to state courts. *See Goehl v. Mellon Bank,* 825 *F.Supp.* 1239 (E.D.Pa. 1993) (plaintiff's motion to remand to state court denied); *Ament v. PNC Nat'l Bank,* 825 *F.Supp.* 1243 (W.D.Pa.1992) (removal jurisdiction found); *Hill v. Chemical Bank,* 799 *F.Supp.* 948 (D.Minn.1992) (adopting *Greenwood*-type analysis in DIDA suit and rejecting plaintiff's motion for remand to state court; removal ju-

risdiction found); and *Nelson v. Citibank (South Dakota), N.A.*, 794 *F.Supp.* 312, 320 (D.Minn.1992) (denying plaintiffs' motion to remand to state court after analyzing section 85 in the same manner as in *Tikkanen*). *Cf. Copeland v. MBNA America, N.A.*, 820 *F.Supp.* 537, 540 (D.Colo.1993) (holding that, because the meaning of interest under section 85 is not self-evident, the preemptive force of sections 85 and 86 is not so extraordinary as to convert state law challenges to late fees into claims arising under federal jurisdiction). This holding resolved only the jurisdictional question of complete preemption and did not prevent the national bank from raising preemption as a defense to the plaintiffs' substantive claims.

Plaintiff contends that the above decisions (aside from *Copeland*) were wrongly decided and that they diverge from the well-established principle that the meaning of interest under section 85 must be determined under federal law. He also argues that, by virtue of federal decisions prior to the enactment of the NBA, as well as the legislative history to the 1864 Act, interest cannot be construed to include late fees.

Plaintiff's position that interest must be defined by federal law is tautological to the extent that federal law incorporates state definitions of interest and/or usury. Conceding the incorporation principle, plaintiff maintains that section 85 draws the line at a state's numerical *rate* of interest but does not incorporate (or allow a national bank to export) broad definitions of interest which may be adopted by the individual states.

While a few of the early cases decided under the NBA which plaintiff cites seem to provide abstract support for this position, each turned ultimately on the fact that some aspect of the NBA specifically supplanted the state law provision sought to be incorporated into section 85. *See First Nat'l Bank v. Dickinson*, 396 *U.S.* 122, 90 *S.Ct.* 337, 24 *L.Ed.*2d 312 (1969) (state law definition of

branch must give way to NBA which provides its own definition); *Evans v. National Bank,* 251 *U.S.* 108, 40 *S.Ct.* 58, 64 *L.Ed.* 171 (1919) (a national bank is not subject to a state law prohibiting the advance receipt of interest because national banks have the express authority to discount notes) and *Haseltine v. Central Nat'l Bank,* 183 *U.S.* 132, 22 *S.Ct.* 50, 46 *L.Ed.* 118 (1901) (federal law was the exclusive remedy for usury violations by a national bank).

Because of their facts, these cases do not bolster plaintiff's argument that only the state's numerical rate of interest is incorporated into section 85. Further, the weight of authority is that section 85 incorporates all state law defining interest and usury. *See Citizens' Nat'l Bank v. Donnell,* 195 *U.S.* 369, 25 *S.Ct.* 49, 49 *L.Ed.* 238 (1904) (NBA follows state law and prohibits compounding of interest where that is prohibited by the state in which the bank is located) and *Daggs v. Phoenix Nat'l Bank,* 177 *U.S.* 549, 555, 20 *S.Ct.* 732, 735, 44 *L.Ed.* 882, 885 (1900) ("[t]he intention of the national law is to adopt the state law, and permit to national banks what the state law allows to the banks organized by it"). *See also First Nat'l Bank v. Nowlin,* 509 *F.*2d 872, 876 (8th Cir.1975) (NBA adopts a state's entire case law interpreting usury limitations: it does not merely incorporate the numerical rate).

The view that section 85 incorporates a state's entire definition of interest is also the underpinning of those pre-*Marquette* decisions which considered whether flat fees were interest under section 85. *See Fisher v. First Nat'l Bank, supra,* and *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.,* 464 *F.*2d 855 (6th Cir.1972). In *Northway,* the court held that prepayment loan charges and closing costs were interest because they were defined as such for savings and loan associations in Michigan and, under the most favored lender doctrine, Michigan national banks were allowed to include these fees under

section 85. 464 *F.*2d at 861-63. It therefore rejected a borrower's contention that the inclusion of these fees rendered a loan usurious.

Likewise, in *Fisher,* the court dismissed a class action by an Iowa credit cardholder who, among other things, disputed the right of a national bank based in Nebraska to charge a flat service fee for cash advances, 548 *F.*2d at 256. While *Fisher* did not expressly state that the service fee was interest under section 85, that is the logical implication of the opinion, which affirmed the District Court ruling that the challenged loan transactions were not usurious because they would have been authorized by Nebraska law for "small loan companies." *Id.* at 259. Under the most favored lender doctrine, *Fisher* ruled that national banks in Nebraska could borrow at those small loan company rates. *Id.* at 261. *See also Panos v. Smith,* 116 *F.*2d 445 (6th Cir.1940) (loan by Michigan national bank was usurious because, under Michigan law, that result was dictated when the maximum rate of interest was charged and the borrower was also required to pay mortgage tax and recording fees: section 85 requires court to look to Michigan law); and *American Timber & Trading Co. v. First Nat'l Bank,* 690 *F.*2d 781, 787 n. 6 (9th Cir.1982) (commenting that NBA's purpose of fostering competitive equality might be best served by a broad reading of the adoption of state law under section 85, although it noted that issue of whether compensating balance requirement increased the effective rate of interest would be the same under federal or state law).

Thus, the 1992 credit card late fee decisions are not, as plaintiff argues, recent anomalies, but are firmly rooted in section 85 jurisprudence. Further, OCC administrative rulings, even prior to *Greenwood,* held that, under *Marquette, Northway, Fisher,* and *Nowlin,* the laws of the state in which a national bank is located determine whether or not it can impose late charges or other fees on credit card holders in other states. *See Clarke v. Securi-*

ties Indus. Ass'n, 479 *U.S.* 388, 107 *S.Ct.* 750, 93 *L.Ed.* 2d 757 (1987) (Comptroller's interpretation of banking act entitled to deference; Court upheld Comptroller's approval of national bank's application to open a "non-branch" office) and *Saul v. Midlantic Nat'l Bank South*, 240 *N.J. Super.* 62, 572 *A.*2d 650 (App.Div.) (citing OCC letter opinion in support of its decision), *certif. denied*, 122 *N.J.* 319, 585 *A.*2d 338 (1990). *Cf. Brambila v. Board of Review*, 124 *N.J.* 425, 437, 591 *A.*2d 605 (1991) (Department of Labor interpretive letter not binding where inconsistent with Congress's objectives in enacting statute). In sum, federal case law and administrative opinions support the trial judge's decision and undercut plaintiff's position that section 85 incorporates only a state's numerical rate of interest.

Further, there is nothing in the dictionary definition of interest which necessarily excludes late fees from the scope of that term. Interest has been described as the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money. *Black's Law Dictionary* 729 (5th ed. 1979). A late fee falls within the ambit of this definition. While interest rate, on the other hand, has been defined as the numerical percentage rate of interest, we agree with *Greenwood* that the phrase need not be read so restrictively when construed in its statutory and historical context. 971 *F.*2d at 825-26.

Plaintiff's reference to the debates of the 1864 Congress where members described the varying interest rates allowed in their respective states only demonstrates that congress contemplated that section 85 includes such rates. It is not determinative of whether the term could *also* include other fees.

Similarly, the early cases plaintiff relies upon do not reflect the view that the term interest could never include late fees or that interest must accrue ratably over time. Instead, they are fact specific and discuss whether a late

fee or interest charge was or was not permitted in certain circumstances. *See, e.g., Loudon v. Taxing Dist.*, 104 *U.S.* 771, 774, 26 *L.Ed.* 923, 924 (1882) (city not obligated to reimburse creditor for excessive interest he had to pay when city failed to make timely payment under contract; interest due creditor under that contract was the measure of all damages); *Brown v. Hiatts*, 82 *U.S.* (15 Wall.) 177, 21 *L.Ed.* 128 (1872) (holding that interest does not accrue on debt during period where, because of Civil War, mortgagee was not permitted to sue on debt: Court rejected mortgagee's attempted distinction between interest which is stipulated in contract and interest which the law allows as damages for the retention of money; the stipulation for interest did not alter the principle that suspended its running during the war); and *Lloyd v. Scott*, 29 *U.S.* (4 Pet.) 205, 7 *L.Ed.* 833 (1830) (where party agrees to pay a specific sum exceeding the lawful interest if he does not remit principal by a specific date, it is not usury; by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered a penalty).

Moreover, other early cases support the position that late fees may be considered interest. *See, e.g., Wilkinson v. Daniels*, 1 *Greene* 179 (Iowa 1848) (holding that note with twelve percent interest could be raised to fifteen percent interest if not paid when due as the fifteen percent interest was not a penalty but a contract to pay that sum upon a contingency) and *Wernwag v. Mothershead*, 3 *Blackf.* 401 (Indiana 1834) (a flat fee becoming payable only if principal is not paid on time is interest).

Plaintiff's reliance on *Merchants' Nat'l Bank v. Sevier*, 14 *F.* 662, 667 (C.C.E.D.Ark. 1882) is not persuasive. There, the court held that a national bank could not include in a promissory note a provision making the borrower liable for attorney's fees on default. It reasoned that a national bank had the ability to make loans and dis-

counts according to standard commercial usage, and that such custom did not authorize attorney's fees. *Id.* at 665. Aside from the differences between attorney's fees and late charges, *Merchants' Nat'l Bank* did not involve an instance where the challenged fees were permitted by state law.

Similarly, the more modern decisions plaintiff cites shed no light on the definition of interest under section 85. *See e.g., Lew v. Goodfellow Chrysler-Plymouth, Inc.*, 6 *Wash. App.* 226, 492, *P.*2d 258, 262 (1971) (holding that provision in note requiring debtor to pay, after maturity, interest at a higher rate is not sufficient to render transaction usurious; late charge is solely within the borrower's control) and *In re Tastyeast, Inc.*, 126 *F.*2d 879, 881-82 (3rd Cir.1941) (while interest rate assessed if note were not paid at maturity was still under usury ceiling, it was nevertheless a penalty rather than liquidated damages and was, under bankruptcy statute, payable only if it was proportionate to damages suffered), *cert. denied, sub nom. Modern Factors Co. v. Tastyeast, Inc.*, 316 *U.S.* 696, 62 *S.Ct.* 1291, 86 *L.Ed.* 1766 (1942). In any case, some decisions held that late fees are interest charges while others did not. *See* Gary D. Spivey, Annotation, *Validity and Construction of Provision Imposing "Late Charge" or Similar Exaction for Delay in Making Periodic Payments on Note, Mortgage, or Installment Sale Contract*, 63 *A.L.R.*3d 50 (1975) (while some courts have viewed late charges as liquidated damages and evaluated them accordingly, late charges have been more commonly construed as stipulations for interest or additional interest). Thus, non-NBA case law does not provide any clear assistance to plaintiff.

Plaintiff's remaining arguments are equally unavailing. With respect to the unlawful delegation of power issue, we agree with *Tikkanen* that Congress did *not* delegate its legislative authority but rather adopted state usury laws with respect to national banks. 801 *F.Supp.* at 280.

Also unpersuasive is plaintiff's related policy argument that the trial court's decision, in effect, allows South Dakota to nullify the restrictions of numerous other states. As *Marquette* recognized, the structure of the NBA always created the potential for impairment of a state's usury laws, because individuals were always free to visit neighboring states and receive credit at foreign interest rates. 439 *U.S.* at 318, 99 *S.Ct.* at 550, 58 *L.Ed.*2d at 548.

Plaintiff's reliance on the non-NBA legislative history likewise fails to pass muster. S.Rep. No. 96-368, 96th Cong., 2d Sess. 19 (1980), *reprinted* in 1980 U.S.C.C.A.N. 236, 255. *Greenwood* specifically found this legislative history to relate only to home mortgage loans and not to section 521 which is the analogue to section 85. 971 *F.*2d at 830 n. 10.

Finally, we note that the surcharges which plaintiff argues are not included in the Federal Reserve discount rate are not comparable to the late fees here.

Affirmed.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CAMDEN COUNTY

Docket No. L-01834-92
Civil Action

MARC SHERMAN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Defendant.

ORDER

THIS MATTER having been opened to the Court upon the application of Dechert Price & Rhoads, attorneys for defendant Citibank (South Dakota), N.A. for an Order dismissing the Amended Class Action Complaint of plaintiff Marc Sherman, and the Court having considered the papers submitted and the arguments of counsel, and good cause having been shown:

IT IS on this 25th day of November, 1992,

ORDERED that the defendant's motion is granted and the plaintiff's Amended Class Action Complaint is hereby dismissed with prejudice.

/s/ John A. Fratto
JOHN A. FRATTO, J.S.C.

This Motion was opposed/unopposed.

APPENDIX D

12 U.S.C. § 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(R.S. § 5197: June 16, 1933, ch. 89, § 25, 48 Stat. 191; Aug. 23, 1935, ch. 614, title III, § 314, 49 Stat. 711; Oct. 29, 1974, Pub. L. 93-501, title II, § 201, 88 Stat. 1558; Nov. 5, 1979, Pub. L. 96-104, title I, § 101, 93 Stat. 789; Dec. 28, 1979, Pub. L. 96-161, title II, § 201, 93 Stat. 1235; Mar. 31, 1980, Pub. L. 96-221, title V, § 529, 94 Stat. 168.)

APPENDIX E

12 U.S.C. § 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

(R.S. § 5198.)

APPENDIX F

NEW JERSEY STATUTES ANNOTATED
TITLE 17. CORPORATIONS AND INSTITUTIONS FOR FINANCE AND INSURANCE
SUBTITLE 2. FINANCIAL INSTITUTIONS
PART 8. INSTALLMENT SALES
CHAPTER 16C. RETAIL INSTALLMENT SALES
1. RETAIL INSTALLMENT SALES ACT OF 1960

17:16C-50. Additional charges prohibited; exceptions

No retail seller, sales finance company, or holder shall charge, contract for, collect or receive from any retail buyer, directly or indirectly, any further or other amount for costs, charges, insurance premiums, examination, appraisal service, brokerage, commission, expense, interest, discount, fees, fines, penalties or other things of value in connection with retail installment contracts or retail charge accounts other than the charges permitted by this act, except court costs, attorney fees and the expenses of retaking and storing repossessed goods which are authorized by law.

CREDIT(S)

1984 Maine Volume

L.1960, c. 40, p. 160, § 50. Amended by L.1971, c. 409, § 14.

APPENDIX G

NEW JERSEY STATUTES ANNOTATED
TITLE 17. CORPORATIONS AND INSTITUTIONS FOR FINANCE AND INSURANCE
SUBTITLE 2. FINANCIAL INSTITUTIONS
PART 8. INSTALLMENT SALES
CHAPTER 16C. RETAIL INSTALLMENT SALES
1. RETAIL INSTALLMENT SALES ACT OF 1960

17:16C-54. Unauthorized costs and charges

Whenever, in any retail installment contract or retail charge account under this act, the retail seller, sales finance company or holder has knowingly charged, contracted for or received from the retail buyer any costs or charges not authorized by this act, all costs and charges in connection with such contract or account, other than for insurance authorized by this act, shall be void and unenforceable, and any such costs or charges other than for insurance authorized by this act shall be applied to the unpaid balance or, if the account has been fully paid, remitted to the retail buyer, and the retail buyer shall be entitled to recover all such costs or charges.

CREDIT(S)

1984 Maine Volume

L.1960, c. 40, p. 162, § 54. Amended by L.1971, c. 409, § 15.

APPENDIX H

NEW JERSEY STATUTES ANNOTATED
TITLE 56. TRADE NAMES, TRADE-MARKS AND UNFAIR TRADE PRACTICES
CHAPTER 8. FRAUDS, ETC., IN SALES OR ADVERTISEMENTS OF MERCHANDISE

56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

CREDIT(S)

1989 Main Volume

L.1960, c. 39, p. 138, § 2. Amended by L.1967, c. 301, § 2, eff. Feb. 15, 1968; L.1971, c. 247, § 1, eff. June 29, 1971; L.1975, c. 294, § 1, eff. Jan. 19, 1976.

APPENDIX I

NEW JERSEY STATUTES ANNOTATED
TITLE 56. TRADE NAMES, TRADE-MARKS AND UNFAIR TRADE PRACTICES
CHAPTER 8. FRAUDS, ETC., IN SALES OR ADVERTISEMENTS OF MERCHANDISE

56:8-19. Action or counterclaim by injured person; recovery of treble damages and costs

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

CREDIT(S)

1989 Main Volume

L.1971, c. 247, § 7, eff. June 29, 1971.

APPENDIX J

[OCC Logo]

Comptroller of the Currency
Administrator of National Banks
Washington, DC 20219

February 17, 1995

John L. Douglas, Esquire
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309

Re: Credit Card Annual Fees and Overlimit and Late Charges Are "Interest" Pursuant to 12 U.S.C. § 85

Dear Mr. Douglas:

This is in reply to your letter on behalf of a group of national banks, located in various states, that issue credit cards to customers. You have requested the opinion of the Office of the Comptroller of the Currency ("OCC") as to whether credit card charges consisting of annual fees, overlimit charges and late charges that are permissible for lenders to impose under the laws of the state where a bank is located constitute "interest" under section 30 of the National Bank Act, 12 U.S.C. § 85 ("section 85"), without reference to whether such fees and charges are denominated "interest" by the laws of the state where the bank is located or the state where the customer resides, and without reference to whether the fees and charges are permissible under the laws of the state where the customer resides.

For the reasons set forth in detail below, it is our view that these charges constitute "interest" for the purpose of section 85 and thus may be assessed by a national bank if similar charges may be imposed by another lender in the state where the national bank is located. This is so

without reference to whether such fees and charges are denominated by state law to constitute "interest" and without reference to whether these charges are permissible under the laws of another state where the customer may reside. This interpretation is supported by the plain terms of the statute and its underlying congressional intent, and is consistent with the results reached in a number of court cases and individual OCC interpretations in which this issue has been examined.[1]

Background

Each of the banks in question issues credit cards to customers located within the state where the bank is located, as well as to customers in other states. Under standard credit card terms, customers may use the cards to obtain cash advances or purchase goods and services from merchants that will honor the card. Unpaid balances carried from month to month incur a finance charge, calculated as a percentage of the balance. This finance charge may be either fixed or variable; it may adjust depending upon whether the balance is attributable to a cash advance or a purchase transaction; and it may vary depending upon the amount of the outstanding indebtedness under a tiered rate scheme. In some instances, banks may require the customer to pay an annual fee to maintain the account.

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[1] We note that our response to your inquiry is limited to the question of whether the described charges constitute "interest" within the meaning of 12 U.S.C. § 85 and is not a determination that federal law preempts the application to a national bank of state law. Accordingly, section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, providing for publication of certain preemption determinations, is inapplicable. Moreover, by its terms, section 114 does not apply to an opinion letter or interpretive rule that raises issues of federal preemption that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule. Several courts, as well as OCC interpretive letters, have previously addressed the question you raise.

Each bank will establish a credit limit for the customer, and customers exceeding the credit limit may be charged an overlimit charge or fee in addition to the finance charge, depending upon the circumstances. Customers failing to make the minimum payment due in a given month may also incur a late charge. This late charge may be calculated as a fixed amount or a percentage, or a combination thereof, depending upon the terms of the credit card account agreement.

In each case, the charges contracted for by the bank are at rates (whether fixed amounts or as percentages, or some combination thereof) that are permissible under the law of the state where the national bank is located for a lender governed by state law. In some instances, these charges may not be permissible under the state law for "banks," but they may be charged by some other lender under applicable state law. In each case, the national bank's lending terms are in accordance with the limitations established by state law that are material to the authorization for a state lender to charge such rates. In some of the states, but not in every state, the charges imposed are deemed by state law to constitute "interest."

Discussion

A. *The Statute*

Section 85 provides in pertinent part that a national bank may:

> take, receive, reserve, and charge on any loan . . . or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at the rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever is greater. . . .

B. *Principles underlying section 85*

1. Most Favored Lender

The legislative concept underlying section 85's authorization for national banks to charge at state rates is the "most favored lender" principle. When it enacted section 85, Congress considered adopting a uniform federal rate for national banks. Congress ultimately rejected that idea, however, and instead decided to place national banks on "precisely the same footing [as lenders] doing business in the [home] State by its laws." Cong. Globe, 38th Cong., 1st Sess. 2126 (1864) (remarks of Senator Sherman, principal drafter of the National Bank Act). This approach was central to Congress' goal of protecting national banks from the hazard of unfriendly legislation by the States. *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1874). Congress was concerned that states would attempt to regulate or interfere with the new national banks in order to advantage state-chartered banks. Congress' straightforward solution was to prescribe that a national bank's charges could be the equal of those allowed to the state-regulated lender most favored by state law where the national bank was located. *See id. See also Daggs v. Phoenix National Bank*, 177 U.S. 549, 554-55 (1900).

The OCC's ruling concerning the application of section 85, 12 C.F.R. § 7.7310, states that a national bank may charge interest at any rate allowed by the law of the state in which it is located for the most favored lender, "subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate." This ruling implements the parity, or "most favored lender," principle underlying section 85. A national bank thus is permitted by section 85 to charge interest at any rate permitted under state law for a competing lender, but it is not authorized by this doctrine to

charge interest at a rate higher than that allowed under state law.

2. Federal Definition of "Interest"

It has been clear, since Congress enacted section 85 in 1864, that section 85 is the exclusive law governing "interest" charged by a national bank in connection with lending. Under this statute, the law of a bank's state of location is relevant only because section 85 specifically authorizes a national bank to charge any "interest at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 85. Thus, state rates are incorporated into federal law as permissible rates for national banks. But the state law itself does not apply to the national bank. As the Supreme Court stated, sections 85 and 86 "cover the entire subject" and the power to supplement [them] by State legislation is conferred neither expressly nor by implication." *Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29, 32, 35 (1875).[2]

Case law establishes that a national bank may charge any amount permitted under state law for other lenders, regardless of whether the state law calls the charges "interest." For example, in *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972), a national bank located in Michigan charged a borrower a 7% finance charge, plus $1,595 in closing costs. Michigan statutes did not allow banks to charge closing costs in excess of $15. But Michigan law did allow savings associations to charge closing costs not identified as interest in addition to periodic percentage charges. The Sixth Circuit held that section 85 authorized the national bank to charge at the same rates as savings associations, notwithstanding the state law terminology, because section 85 puts national banks "on precisely the

[2] Sections 85 and 86 were enacted as Section 30 of the National Bank Act of 1864. For simplicity, this letter refers to the current codification, 12 U.S.C. §§ 85 and 86.

same footing" as the most favored lender subject to state law. *Id.* at 862.

State laws that define the term "interest" for their own purposes may often provide examples of the breadth of that term. But section 85's reach cannot be constricted by narrow state terminology. *Cf. Tikkanen v. Citibank (South Dakota) N.A.*, 801 F. Supp. 270, 278 (D. Minn. 1992). Accordingly, we reaffirm our previous conclusions that a national bank may impose charges permitted by the state where it is located to the state's most favored lender notwithstanding that the state may not define the charges as "interest".[3] The point of section 85 is to authorize, and limit, a national bank's lending charges in accordance with what charges are actually allowed under state law for the most favored state-regulated lender, under whatever nomenclature.

3. "Interest" to be Interpreted Broadly

By its terms, section 85 is broadly written to apply to all interest charged as compensation for a loan. The National Bank Act was an expansively written statute designed to be an outline for a new national bank system. The Act did not contain a specific definition of the term "interest" and the term "interest" did not have any single narrow definition in the judicially-made law of that time. In general, the term was understood to include all "compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention." *Brown v. Hiatts*, 82 U.S. (15 Wall. 177-87, 185) (1873) (*"Brown"*) (relating to interest on a delinquent loan). *See also Shoemaker v. United States*, 147 U.S.

[3] In its opinion letters discussing Section 85, the OCC has described in various ways the role of state law in the determination of what charges are permissible under the federal statute. Whatever ambiguity may exist in certain letters regarding the role of state law, there should be no doubt that the boundaries of Section 85 are a matter of federal law.

282, 321 (1893) ("Interest accrues either by agreement of the debtor to allow it for the use of money, or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due"). Congress intended for the term "interest" in section 85 to be understood broadly to include any kind of lending charge allowed to state lenders in order to achieve Congress' goal of putting national banks on at least as strong a footing as the most favored lender subject to state control. *See Tiffany*, 85 U.S. (18 Wall.) at 413. *See also* Letter from Richard V. Fitzgerald, Director, OCC Legal Advisory Services Division (Nov. 24, 1980), 3 ("[A]ll charges permitted or prohibited by [a national bank's home] state law in connection with particular types of loans may be defined as 'interest' " governed by section 85).

Consistent with Congress' broad goals and its use of the inclusive word "interest" in section 85, the statute has been interpreted to apply to lending charges of all kinds that are permitted by state law where the national bank is located. Section 85 has been uniformly held to apply to any kind of charge imposed by a national bank for borrowing or keeping its money. The Supreme Court held that section 85 governs "penalty" charges imposed for "failure to pay [an account] when due." *Citizens' National Bank of Kansas City v. Donnell*, 195 U.S. 369, 373-74 (1904) ("*Donnell*"). The Pennsylvania Supreme Court has held that section 85 covers a brokerage fee for selling bonds that was charged to a borrower (in addition to percentage finance charges) in connection with a loan. *In re Gerber's Estate*, 9 A.2d 438, 442-43 (Pa. 1939). The Sixth Circuit has held that section 85 governs flat closing costs in addition to the periodic percentage charge for a loan. *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d at 861-64. The Eighth Circuit has held section 85 applicable to credit card cash advance fees. *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 258-59 (8th Cir. 1977). The First Circuit,

and many other courts, have held that section 85 governs credit card late charges and other charges. *Greenwood Trust Co. v. Commonwealth of Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). Other state and federal courts have held that section 85 applies to single-sum charges set without regard to the amount or duration of the loan,[4] bonuses and commissions paid to the lender,[5] charges for mortgage taxes and recording fees,[6] compensating balance requirements,[7] and charges for transaction costs.[8]

Our own interpretations of section 85 are in accord with these holdings. For example, in 1980, the Pennsylvania Attorney General sought a ruling from the OCC about whether that state's consumer credit statutes, which prohibited certain credit card charges, applied to charges on credit cards of Pennsylvania residents that were collected by national banks located out-of-state. The OCC held that section 85 governed these charges as "interest" and authorized the charges at rates allowed by the laws of the national bank's home state and that Pennsylvania law was therefore inapplicable. *See* Letter from Richard V. Fitzgerald, *supra*, at 3. The 1980 letter is consistent with other OCC interpretations.[9]

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[4] *Cades v. H & R Block, Inc.*, No. 92-1454-21 (D.S.C. 1993), *affirmed*, No. 93-2555 (4th Cir., Dec. 30, 1994).

[5] *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir.), *cert. denied*, 290 U.S. 685 (1933); *Baker v. Lynchburg National Bank*, 91 S.E. 157, 161 (Va. 1917).

[6] *Panos v. Smith*, 116 F.2d 445, 446 (6th Cir. 1940); *Schumacher v. Lawrence*, 108 F.2d 576, 577 (6th Cir. 1940).

[7] *American Timber & Trading Co. v. First National Bank of Oregon*, 690 F.2d 781, 787 (9th Cir. 1982); *McAdoo v. Union National Bank*, 535 F.2d 1050, 1056-58 (8th Cir. 1976).

[8] *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 258-59 (8th Cir. 1977); *First National Bank v. Phares*, 174 P. 519, 520 (Okla. 1918) (*per curiam*).

[9] *See, e.g.*, Letter from Robert B. Serino, Deputy Chief Counsel (Aug. 11, 1988) (OCC Interpretive Letter No. 452), *reprinted in*

4. Exportability of Interest

Section 85 authorizes a national bank to charge interest at rates allowed by the laws of the state where it is located in connection with loans both to residents of that state and to residents of other states. The law of the state where the borrower resides is not relevant. *See Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 318 n.31 (1978) ("*Marquette*") ("state usury laws must of course, give way to the federal statute"). In *Marquette*, the Supreme Court held that a national bank in Nebraska could charge interest at Nebraska rates to customers residing in Minnesota. Congress authorized national banks to charge the same

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[1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (credit card late charges, returned check charges, and cash advance charges); Letter from Kenneth W. Leaf, OCC Chief National Bank Examiner (Feb. 13, 1974); Letter from W.M. Taylor, Deputy Comptroller of the Currency (June 10, 1961) (service charges); Letter from W.M. Taylor, Deputy Comptroller of the Currency (June 1, 1956) (fees for expenses); Letter from L.A. Jennings, Deputy Comptroller of the Currency (Feb. 24, 1955) (delinquency charges); Letter from R.B. McCandless, Deputy Comptroller of the Currency (Sept. 3, 1947) (service charges); Letter from J.L. Robertson, Deputy Comptroller of the Currency (Feb. 4, 1946) (set-up charges, collection charges).

A dissenting opinion in one case has suggested that a 1964 letter issued by the OCC is contrary. *See Smiley v. Citibank (South Dakota) N.A.*, 32 Cal. Rptr. 2d 562, 571 n.7 (Ct. App. 1994) (Johnson, J., dissenting) (citing Letter from J. Saxon, Comptroller of the Currency (June 25, 1964)), *review granted*, 35 Cal. Rptr. 2d 269 (Cal. 1994). But that view is wrong. The 1964 letter states that "[c]harges for late payments . . . are illustrations of charges which are made by some banks which would not properly be characterized as interest" apparently for purposes of calculating which charges would be permissible under the applicable state law limitations. The letter does not state that late payments were not interest within the meaning of Section 85. Reply of the United States, on Behalf of the Office of the Comptroller of the Currency, as *Amicus Curiae*, to Plaintiff's Supplemental Response at 4, *Richardson v. Citibank (South Dakota) N.A.*, No. 92-CV-1460 (Colo. Dist. Ct. Mar. 21, 1994) (filed Dec. 10, 1992).

rates to all borrowers wherever located in order to foster interstate lending and to give borrowers the opportunity to obtain interstate credit from national banks on terms that may not be available in the borrower's state. *See* 439 U.S. at 313-17. Accordingly, we reaffirm our previous conclusion that "interest" permitted under section 85 may be charged without reference to whether all or part of it is permissible under the laws of the state where the customer resides. If the law of the state where the customer resides is different from the law of the state in which the bank is located, the former law has no effect on what the bank may charge as "interest".

C. *The Charges in Question: Annual Fees, Late and Overlimit Charges*

The remaining issue is whether the specific charges you mention constitute "interest". For the reasons stated below, we conclude that they are all "interest" within the meaning of section 85.

1. Annual fees

Credit card annual fees are charges that the bank requires a borrower to pay as compensation for use of the bank's money on credit card transactions. Banks typically structure their credit card terms to include annual fees as an alternative to higher monthly percentage finance charges on outstanding balances, and to compensate the bank for other costs and risks associated with establishing and maintaining the account.[10] Annual fees fit squarely within the traditional definition of "interest": "compensation . . . fixed by the parties, for the use or forbearance of money, or as damages for its detention." *Brown*, 82 U.S. (15 Wall.) at 185. The annual fee is akin to commissions, closing costs, or other charges to establish a loan or line

[10] *See, e.g., Marquette, supra*, 439 U.S. at 302-03 (noting trade-off between annual fee and monthly percentage finance charges).

of credit, which have routinely been held subject to section 85.[11] Courts, and the OCC, have therefore held that credit card annual fees are covered by section 85. *Ament v. PNC National Bank*, 849 F. Supp. 1015 (W.D. Pa. 1994) (on appeal); *Northampton National Bank v. Attorney General*, 397 N.E.2d 1149, 1150 n.3 (Mass. App. Ct. 1979); Letter from Richard V. Fitzgerald, *supra*.

A recent decision of the Pennsylvania Supreme Court, *Mazaika v. Bank One, Columbus, N.A.*, No. 231, 1994 Pa. Super. LEXIS 3612 (Pa. Super. Ct. Dec. 14, 1994) (*en banc*) (*"Mazaika"*), however, concluded that credit card annual fees are not governed by section 85 because a charge cannot be "interest" unless it is "levied on a percentage basis." *Id.* at *18. That conclusion is contrary to the purpose and terms of section 85, and it is not supported by any other case or OCC interpretation applying section 85.

Nothing in the meaning of the word "interest" requires that it be set at percentage rates. Historically, interest was often prescribed in a contract as a fixed amount. Even today, while parties refer to interest most frequently in percentage terms, it is not always stated that way. In *Greenwood Trust Co., supra*, the First Circuit examined this issue carefully and rejected the idea that

> the plain meaning of "interest" necessarily restricts the definition of the word to numerical percentage rates. . . . [Dictionary] definitions do not limit interest to numerical percentage rates, for they simply note that interest is often, *but not always*, expressed as a percentage. . . . Judicial opinions also tend to shy away from limiting the word "interest" to numerical percentage rates.

971 F.2d at 824-25 (Emphasis added.) The Court also stated:

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[11] *See, e.g., Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d at 861-64; *Cronkleton v. Hall*, 66 F.2d at 387; *Baker v. Lynchburg National Bank*, 91 S.E. at 161; *In re Gerber's Estate*, 9 A.2d at 443.

> Federal common law brings us to precisely the same result. Several courts, in analyzing the language of section 85 . . . have had little trouble in construing the term "interest" to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate.

Id. at 829.

The idea that section 85 applies only to charges figured as a percentage also is inconsistent with the purposes of the statute. Section 85 authorizes a national bank to charge interest at any rate allowed by the law of the state where it is located. The Act leaves it up to the state to decide what rate is allowed and how it may be calculated. Accordingly, if a state allows state banks to charge credit card annual fees at flat rates, then section 85 allows national banks to do so as well. If national banks were not allowed to match state-regulated lenders on these flat loan charges, then the "most favored lender" principle would be destroyed.

Finally, judicial decisions and OCC interpretations have routinely applied section 85 to a variety of charges set at flat amounts. *E.g., Greenwood Trust, supra* (flat late charges); *Northway Lanes, supra* (flat closing costs); *see also* other cases cited *supra* notes 4-8 and accompanying text. *See generally Nelson v. Citibank (South Dakota) N.A.*, 794 F. Supp. 312, 319 (D. Minn. 1992) (authority interpreting section 85 to apply to flat charges is "rather overwhelming").

It has also sometimes been suggested that, when a borrower is charged a periodic monthly rate for borrowed money, any additional charge must be considered something other than "interest"—on the theory that the periodic percentage charge is the "real" interest. This argument is untenable. There is nothing in the words of section 85 to suggest that the "rate" a national bank charges for money cannot be a combination of flat and percentage figures.

The "most favored lender" purpose of the statute would be frustrated if section 85 were not understood to authorize all of the same charges that are permitted to a state-institution, however calculated. It is equally well established that section 85 applies to all of the loan charges levied on an account. *E.g., Greenwood Trust Co., supra* (monthly percentage charges and late charges); *Northway Lanes, supra* (annual percentage charge and closing costs); *In re Gerber's Estate, supra* (annual percentage charge and commission); *Northampton National Bank, supra* (monthly percentage charges and annual fee); Letter from Robert B. Serino, *supra* (monthly percentage charges and various other credit card charges); Letter from Richard V. Fitzgerald, *supra* (monthly percentage charges and annual fee).

2. Late charges

Credit card late charges may be incurred, under the typical contract, when the borrower fails to pay the minimum monthly payment due on a credt card account. Credit risks associated with delinquent borrowers are typically higher than for comparable borrowers who have not been delinquent, and a bank's costs for monitoring and collecting an account rise if the account is late. Credit card late fees are increased charges to borrowers who engage in delinquent payment behavior in order to compensate the bank for these increased lending costs and risks, just as banks customarily charge higher rates in other contexts to borrowers who have had payment problems or otherwise appear to pose higher risks. Credit card late charges are permissible under the laws of many (though not all) states.

These late charges are in addition to the basic monthly percentage finance charge on the account, and they represent an increased lending charge applicable when the customer retains the bank's money beyond the agreed upon date of payment. Accordingly, they are "interest"

under the classic definition articulated in *Brown* and similar cases: "compensation . . . fixed by the parties, for the use or forbearance of money, or as damages for its detention." 82 U.S. (15 Wall.) at 185. Courts in other contexts have long recognized that higher charges for delinquency fit the classic understanding of the term "interest." [12]

Section 85 has consistently been held to govern late charges and analogous charges. In *Donnell*, for example, the Supreme Court applied section 85 to a charge incurred when a borrower became overdrawn on his account and the national bank charged him at a rate that exceeded the permitted rate in that state for the most favored lender. The bank argued that the charge was not governed by section 85 on the ground "that this charge was a penalty because of a failure to pay a debt when due." 195 U.S. at 373-74. But the Supreme Court rejected that argument, holding sections 85 and 86 applicable to the overcharge. Other judicial decisions, and the OCC, have specifically held credit card late fees to be subject to section 85. *E.g., Greenwood Trust Co., supra*; *Ament, supra*; *Tikkanen, supra*; *Harris v. Chase Manhattan Bank, N.A.*, 35 Cal. Rptr. 2d 733 (Ct. App. 1994); *Sherman v. Citibank (South Dakota), N.A.*, 640 A.2d 325 (N.J. Super. Ct. App. Div. 1994), *cert. granted*, Oct. 24, 1994; *Cope-*

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[12] For example, during the nineteenth century it was frequently held that late payment charges on loans were "interest," whether they were assessed as a flat, per week charge, *e.g., Wernwag v. Mothershead*, 3 Black 401, 402 (Ind. 1834), or as a higher percentage rate for payment of a loan after its due date, *e.g., Daggett v. Pratt*, 15 Mass. 177 (1818). In holding that a three percent late payment charge—raising the loan's interest rate from twelve to fifteen percent—was "interest," the Supreme Court of Iowa explained: "It is a contract to pay fifteen per cent. interest per annum on a contingency . . . ." *Wilkinson (Wilkerson) v. Daniels*, I Greene 179, 188 (Iowa 1848). While some cases have held, under state law, such charges may not be "usury"—that is, prohibited charges—they have rountinely recognized such charges as "interest." *E.g., Smith Mach. Co. v. Jenkins*, 654 F.2d 693, 696 (10th Cir. 1981).

land v. MBNA America, N.A., 883 P.2d 564 (Colo. Ct. App. 1994), *cert. granted* (Oct. 24, 1994); Letter from Robert B. Serino, *supra*.[13]

The *Mazaika* case held that credit card late charges are not governed by section 85 on the ground that late charges are, typically, specified in the credit card agreement as a flat amount rather than a percentage. *Id.* at *18. For the reasons stated above, that theoy is insupportable under well developed authorities applying section 85, under the plain language and purposes of section 85, and under the traditional understanding of the concept of "interest," which includes all compensation for borrowing, however calculated.

It has also been suggested, in a dissenting opinion from a decision upholding the application of section 85 to credit card late charges, that section 85 should be inapplicable because these charges are "contingent" on the borrower's failure to pay on time. *Smiley v. Citibank (South Dakota), N.A.*, 32 Cal. Rptr. 2d 562, 569 (Ct. App.) (Johnson, J., dissenting), *review granted*, 35 Cal. Rtpr. 2d 269 (1994). *Accord Mazaika*, at *69-*75 (Cirillo, J., concurring). That argument simply does not make sense. Many charges, including the regular monthly percentage finance charges on a credit card account, are "contingent" on whether the customer draws on the account or on the amount or duration of the draw, but they are still recognized as "interest." The classic articulation of the meaning of "interest" in *Brown* includes contingent "damages for . . . detention" of money. 82 U.S. (15 Wall.) at 185.

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[13] As noted in footnote 9, in 1964, the OCC issued a letter to a national bank stating that charges for late payments "are illustrations of charges which are made by some banks which would not properly be characterized as interest." Letter from James J. Saxton, Comptroller of the Currency, dated June 25, 1964. The above passage was not issued in the context of a determination on whether the term "interest" used in the federal statute includes late charges and is not a ruling of the agency with respect to that question.

Elsewhere, in discussing the nature of "interest," the Supreme Court has observed that "[t]he institution of interest originated under Roman law as a penalty due from a debtor who delayed or defaulted in repayment of a loan." *Library of Congress v. Shaw*, 478 U.S. 310, 315 n.2 (1986). Specifically with respect to national banks, *Donnell* establishes clearly that a contingent charge imposed by a national bank on an extension of credit because of the borrower's failure to pay on time is governed by section 85. 195 U.S. at 373-74.

3. Overlimit charges

Credit card agreements typically call for payment of overlimit fees when a customer's draws on the account exceed the amount that the bank has agreed to advance. Because these excess draws involve a significant credit risk, the bank's agreement with the customer provides for a supplemental charge, in addition to the basic finance charge.

Overlimit charges are "interest" governed exclusively by section 85 because they fit the traditional meaning of that term: They are part of the "compensation . . . fixed by the parties, for the use . . . of money." *Brown*, 82 U.S. (15 Wall.) at 185. Judicial decisions and the OCC have previously held that section 85 is applicable to these charges. *See Ament, supra*; *Tikkanen, supra*; Letter from Robert B. Serino, *supra*.

The application of section 85 to these charges does not present any issues different from those involved in the application of section 85 to other credit card charges. As with annual fees, the *Mazaika* decision held that overlimit charges are not "interest" governed by section 85 because they are not specified at a percentage rate. For the reasons stated above, however, we conclude that section 85 is not limited to percentage charges; *Mazaika* is simply incorrect. Similarly, as discussed above, the fact that overlimit charges are "contingent" on the amount of credit the customer draws is of no significance to whether they are

governed as "interest" by section 85. *See, e.g., Marquette, supra* (finance charges are "interest" governed by section 85, even though the percentage rate applicable was contingent on the amount of the account balance).

Conclusion

Based on the foregoing, we conclude that the described credit card annual fees and late and overlimit charges constitute "interest" within the meaning of 12 U.S.C. § 85, and that a national bank located in a state where another lender is permitted to assess such fees and charges may assess the charges without reference to whether the fees and charges are denominated "interest" by the laws of either the state where the bank is located or the state where the customer resides, and without reference to whether these charges are permissible under the laws of another state where the customer may reside.

Very truly yours,

/s/ Julie L. Williams
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Chief Counsel

Supreme Court, U.S.
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No. 95-991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

MARC SHERMAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

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AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

This amici curiae brief is filed in support of Citibank (South Dakota), N.A. by MasterCard International Incorporated ("MasterCard") and VISA U.S.A. Inc. ("VISA"). MasterCard and VISA (collectively, "Amici") agree with Petitioner that a writ of certiorari should be granted in *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995)

("*Sherman*"). Petitioner and Respondent each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

VISA and MasterCard are associations of financial institutions that license service marks for use in connection with credit cards, debit cards, automated teller machines and related financial services. As of year-end 1994, VISA and MasterCard had approximately 17,000 and 13,600 depository institution members, respectively, that collectively have issued a credit card to most adults in the United States. *The Nilson Report*, Issue No. 591 (Mar. 1995) at 8.

Amici's members that are national banks are vitally interested in the proper interpretation of 12 U.S.C. § 85 ("Section 85"), which governs the interest that may be charged on loans made by national banks. Amici's members that are state-chartered banks, federally- or state-chartered savings associations, or federally- or state-chartered credit unions, also are particularly interested in the interpretation of Section 85 because most of these federally-insured depository institutions have authority under Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (1980), to charge the same interest that national banks are authorized to charge under Section 85. *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 830 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (Section 521) ("*Greenwood Trust*"); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (Section 522).

The discussion below focuses on the importance of this case for the credit card industry because *Sherman* deals with credit card loans. However, Section 85 and Sections 521 through 523 of DIDA are not limited to credit card

programs; they apply to all types of retail and commercial loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) (tax refund anticipation loans). Thus, the principle at issue in this case is critically important for virtually every lending function of the banking industry.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve an irreconcilable conflict between the New Jersey Supreme Court on the one hand, and the California and Colorado Supreme Courts and the United States Courts of Appeals for the First and Third Circuits on the other hand, on the important federal question of whether late fees are interest for purposes of Section 85 and Section 521 of DIDA. Immediate resolution of this issue is urgently needed to reestablish the uniform national rule that the federal government established for the national banking system, but that was not followed by the New Jersey Supreme Court.

Prompt review by this Court is imperative because uncertainty regarding the permissibility of late charges assessed with respect to billions of dollars of credit will adversely affect both the ability of borrowers to obtain credit and the national economy. Resolution of this issue also significantly affects the extraordinary liability plaintiffs seek to impose on Amici's members that have collected late fees permitted by federal law, but not the law of the borrower's state.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT AND STATE COURTS OF LAST RESORT IN TWO STATES AS WELL AS TWO FEDERAL COURTS OF APPEALS.

Review on a writ of certiorari is proper in this case because a state court of last resort has decided a federal question in a way that directly conflicts with the decisions of state courts of last resort in two other states and two federal Courts of Appeals. *See* Sup. Ct. R. 10(b).

Late fees charged by a national bank on credit card loans were held to be interest for purposes of Section 85 by the California Supreme Court in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for cert. filed*, 64 U.S.L.W. 3417 (U.S. Nov. 30, 1995) (No. 95-860) (*"Smiley"*), by the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) ("*Copeland*"), and *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) ("*Richardson*"), and by the United States Court of Appeals for the Third Circuit in *Spellman v. Meridian Bank*, No. 94-3203, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) ("*Spellman*").

Similarly, late fees assessed on credit card loans by a state-chartered bank were held to be interest for purposes of Section 521 of DIDA by the United States Court of Appeals for the First Circuit in *Greenwood Trust*, by the Colorado Supreme Court in *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) ("*Stoorman*"), and by the California Court of Appeal in *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346, *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for cert. filed*, 64 U.S.L.W. 3438 (U.S. Dec. 18, 1995) (No. 95-951) ("*Harris*").

The *Smiley*, *Copeland*, *Richardson*, *Spellman*, *Greenwood Trust*, *Stoorman* and *Harris* decisions persuasively and correctly explain why both Section 85 and Section 521 of DIDA apply to late fees. Nonetheless, the New Jersey Supreme Court held in *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 18, 1995) (No. 95-963) ("*Hunter*"), and in *Sherman* that late fees on credit card loans are not covered by Section 85 and Section 521 of DIDA because those statutes apply only to periodic percentage rate charges assessed on outstanding loan balances.

This conflict on the proper interpretation of Section 85 and Section 521 of DIDA is most acute in New Jersey. As a result of the Third Circuit's decision in *Spellman*, federal courts in New Jersey will recognize that late fees are interest under Section 85 and Section 521. However, state courts in New Jersey must follow the New Jersey Supreme Court's decisions in *Sherman* and *Hunter*, which are in direct conflict with *Spellman*.

Without resolution by this Court of the conflict on this critical issue, the scope of federal interest authority under Section 85 and Section 521 will vary depending on the state in which a bank's borrowers reside. Such a result would be inconsistent with the principle in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that Section 85 applies on the basis of the national bank's location and not the borrower's residence.

Not only does the New Jersey Supreme Court's interpretation of Section 85 and Section 521 of DIDA conflict with decisions from the California and Colorado Supreme Courts and the First and Third Circuits, it also conflicts with the interpretation of the federal agencies charged with interpreting these federal statutes. The Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation ("FDIC") have stated repeatedly that credit card late fees are covered by Section 85 and Section 521, respectively. *See, e.g.*, Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 (reaffirming and restating the OCC's long-time position); Letter from Douglas Jones, FDIC Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534.

In addition, as part of the OCC's general revisions to its interpretive rules, the OCC has proposed to codify its position that late fees are "interest." *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (Mar. 3, 1995). Nonetheless, the New Jersey Supreme Court refused to grant to the interpretations of the federal agencies the deference called for by this Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995) and *Federal Deposit Insurance Corporation v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986).

The resolution by this Court of the central and fundamental federal question of whether Section 85 and Section 521 of DIDA apply to late fees is urgently needed now. There is no dispute that the late fees assessed by national and state banks in numerous pending lawsuits are permissible if Section 85 and Section 521 apply. A conclusive answer from this Court that late fees are interest thus will resolve those lawsuits, and avoid unnecessary, repetitive, costly, and disruptive additional litigation. Immediate resolution of the conflict on this issue also is essential to enable national and state banks to know what law applies to the late fees they charge on the billions of dollars of credit now being extended to borrowers, and to ensure that the national banking system functions effectively and efficiently.

II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE.

Financial institutions in the United States regularly extend enormous amounts of credit on credit card accounts. The outstanding balances on VISA and MasterCard credit cards issued in the United States alone exceeded $275 billion at mid-year 1995. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Amici's members which extend the hundreds of billions of dollars of credit must be able to determine whether late fees are included in the federal interest authority provided by Section 85 and Section 521, since late fees constitute a significant component of credit card pricing. Absent such guidance, banks cannot know whether their lending charges comply with applicable fee limitations. If they guess wrongly, they are exposed to tens, if not hundreds, of millions of dollars of liability for imposing excess fees.

The late fee itself is a very important price component of credit card loans. That fee facilitates the fair and efficient

administration of credit card programs; it allows card issuers "to impose default costs on late payers, who are responsible for them, and to avoid shifting [such costs] to timely payers, who are not." *Smiley*, 11 Cal. 4th at 161. In addition, late fees constituted a majority of the estimated $2.1 billion in miscellaneous fees (namely, fees other than periodic finance charges, annual fees and cash advance fees) that were collected by bank card issuers in 1994. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

This issue already has generated a significant amount of complicated, time-consuming, and expensive litigation. Over forty-five class action lawsuits and state enforcement actions have been filed across the country since November 1991 challenging whether Section 85 or Section 521 applies to late fees on credit card loans. To date, such cases have been filed in Alabama, California, Colorado, Maine, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, and Wisconsin. In many instances, the plaintiffs' theories of state law violations could result in recoveries of a multiple of the allegedly excessive late fees, or even forfeiture of all charges (including periodic finance charges). Prompt resolution of the scope of Section 85 and Section 521 is thus needed to protect national banks and state banks from potentially ruinous damages under state law.

The current uncertainty also presents a clear risk of substantial disruption to the nation's credit card payment systems, which are critical to the functioning of the nation's economy. At mid-year 1995, there were approximately 343.1 million VISA and MasterCard credit cards issued domestically, which accessed about 252.9 million accounts. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Annualizing data for the first six months of 1995, there were approximately 5.5 billion transactions on VISA and MasterCard credit cards issued in the United States alone, for an aggregate volume of $490.5 billion. *Id.*

In reliance on existing case law and the interpretations of the OCC and FDIC, Amici's members have established pricing for their credit card accounts based upon the understanding that federal law controls the permissibility of late fees. If the courts do not follow the federal agencies' guidance on this point, the pricing structures of Amici's members will be at risk, leaving those institutions in a potentially precarious state. In addition, new interpretations of the applicable law that governs late fees will force Amici's members to engage in costly and time-consuming changes to existing account pricing strategies and systems for servicing their credit card accounts. The uncertainty and resulting dislocation are likely to impact significantly the availability of credit on bank cards nationwide.

CONCLUSION

For the reasons set forth above, Amici strongly urge the Court to grant the petition for certiorari in this case.

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(3)

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No. 95-991

In The

Supreme Court of the United States

October Term, 1995

CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

MARK SHERMAN,

Respondent.

On Petition For A Writ Of Certiorari
To The New Jersey Supreme Court

RESPONDENT'S MEMORANDUM OF NON-OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The sole question identified by petitioner does not adequately state the issues presented. If certiorari is granted, the Court should consider the following:

1. Did Congress intend South Dakota's legislative definition of "interest" to define the federal term "interest" in Section 30 of the National Bank Act ("NBA"), Act of June 3, 1864, ch. 106, § 30, 13 Stat. 99, 108 (codified as amended at 12 U.S.C. § 85 (1994)) ("§ 85"), and thereby displace other states' contract laws limiting the form or amount of contractual penalties for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to South Dakota the power to define the federal lending term "interest" for all fifty states so as to preempt other states' contract laws?

3. As a matter of federal law, does "interest at the rate" in § 85 include contingent, sum-certain penalty charges (late fees) so as to preempt state limitations on the form or the amount of contractual penalties on revolving credit accounts?

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STATEMENT

Marc Sherman ("respondent" or "cardholder"), respectfully responds to, but does not oppose, the petition of Citibank (South Dakota), N.A. ("Citibank" or "the bank") for a writ of certiorari to review the judgment rendered in this action on November 28, 1995 by the New Jersey Supreme Court. In that decision, New Jersey's high court correctly held that "late-payment fees are not 'interest' within the intendment and purposes of the applicable federal statute." (Pet. App. 2a). The court further concluded that cardholder's state law claims do not conflict with federal law and are not preempted. *Id.* Though that decision is correct in every respect, cardholder recognizes that this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition for certiorari, but wishes to point out certain misstatements made in the petition.

ARGUMENT

I. THE BANK HAS MISSTATED THE ISSUES THAT WARRANT REVIEW.

As correctly noted by the bank, the opinion below directly conflicts with recent decisions rendered by the California and Colorado supreme courts. *See Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S. Ct. 806 (1996); *Harris v. Chase Manhattan Bank, N.A.*, 30 Cal. App. 4th 130, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 540, *review dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No.

95-951 (U.S. filed Dec. 18, 1995); *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. Dec. 18, 1995); *Copeland v. MBNA America, N.A.*, 907 P.2d 87 (Colo. Nov. 20, 1995), *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995). All of these decisions, like the case at bar, interpret, apply and determine the preemptive scope of § 85 of the NBA.[1]

In *Smiley*, this Court granted certiorari on the three issues set forth above as the "Questions Presented." Here, the bank maintains that this case and *Smiley* conflict on the same matters, yet it seeks review of only one issue – whether "interest" includes late fees. As this Court apparently recognized in granting review in *Smiley*, the other issues raised by these cases – whether Congress intended for one state's definition of "interest" to define the federal term for all fifty states and thereby displace other states' contract laws, and whether Congress can constitutionally delegate such power to a single state[2]

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[1] The lower court's opinion also conflicts indirectly with two other decisions that interpret, apply, and determine the preemptive scope of section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d (1994) ("§ 521"), the federal statute governing the "rate" of "interest" charged by federally insured state banks. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Stoorman v. Greenwood Trust Co.*, 908 P.2d 133 (Colo. Dec. 18, 1995). Because § 521 mirrors § 85, the issues raised by the § 521 cases are virtually the same as those raised here.

[2] These other two issues arise because, if the bank's interpretation of "interest" in § 85 is correct, and the New Jersey Supreme Court's interpretation is wrong, then that necessarily would mean that South Dakota law must provide the definition

– are significant and worthy of the Court's consideration. Accordingly, if the Court grants certiorari here, respondent respectfully submits that it should do so on the same three issues as have been accepted for review in *Smiley*.

II. THE BANK HAS MISSTATED THE EXISTENCE AND SIGNIFICANCE OF OTHER CONFLICTS.

In its reasons for granting certiorari, Citibank argues that the decision below conflicts with the opinions of the Office of the Comptroller of the Currency ("OCC"). However, that agency's views are not entitled to deference because, among other things, (i) the OCC has been inconsistent on these matters;[3] (ii) § 85 does not delegate

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of the federal term. If that is the case, then South Dakota would be defining federal lending terms for the entire nation.

[3] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 466 n. 30 (1987) (an agency's interpretation which conflicts with its earlier interpretation is "entitled to considerably less deference" than a consistently held view). For example, in this case and others pending around the country, the OCC initially maintained that the federal statutory term "interest" must be defined pursuant to state law. More recently, the agency has changed its view and has conceded that federal law must define the term. In fact, the OCC has taken at least eight inconsistent positions with respect to the term "interest." *E.g.*, compare June 25, 1964 letter written by Comptroller James J. Saxon (concluding that late fees are not interest) with OCC Interpretive Letter No. 670 [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,618 (Feb. 17, 1995) (opining otherwise). This inconsistency is aggravated by Congressional and other agency statements establishing that late fees and other loan penalties are not "interest" under the federal banking laws. For example, in 1980, relying on the legislative history of DIDA, S. Rep. No. 368, 96th Cong., 1st Sess. 19 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 255, the only

interpretative authority to the OCC;[4] (iii) a court may defer to an agency opinion only when a federal statute is "silent" or "ambiguous," but when a statute is silent or ambiguous with respect to preemption, the presumption against preemption should preclude a finding of preemption;[5] (iv) the OCC's interpretative letters were written by staff attorneys, not by the agency head;[6] (v) many of the

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federal banking regulator with any delegated authority to interpret the interest rate statutes, the Federal Home Loan Bank Board ("FHLBB"), adopted a federal regulation stating:

> Nothing in this section [501 of DIDA] preempts limitations in state laws on prepayment charges, attorneys' fees, *late charges* or other provisions designed to protect borrowers.

12 C.F.R. § 590.3(c) (emphasis added). That regulation, which should apply to all the interest rate sections of the same Act, practically quotes DIDA's legislative history verbatim. *See* 1980 U.S.C.C.A.N. at 255.

[4] When Congress delegates interpretative authority to the bank regulators, it does so expressly. Section 84(d) of the National Bank Act, for example, includes such a delegation. 12 U.S.C. § 84(d) (1994). In contrast, § 85 does not confer any interpretative powers on the OCC. In the absence of such delegation, the agency's interpretation cannot be given any deference. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

[5] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter"); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").

[6] The OCC has represented to this Court that informal letters by staff members are not binding, are not reliable and do not constitute final agency action. *See* Brief for the Federal Petitioners filed in *NationsBank, N.A. v. Variable Annuity Life Insurance Co.*, Nos. 93-1612, 93-1613, brief at 38, n. 19 (U.S. filed

OCC's opinions are *ad hoc* and were arrived at in connection with the current litigation solely to rationalize the result the agency already had reached;[7] and (vi) the opinions lack a sustainable rationale.[8] Because the OCC is not entitled to deference, the fact that the decision below conflicts with its views is not an appropriate basis for granting certiorari.

The bank also argues that certiorari should be granted because the lower court's opinion purportedly conflicts with jurisprudence determining that the term "interest," as ordinarily used in 1864, encompassed all charges for the use or forbearance of money, including

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July 29, 1994). The only opinion by the agency head in this case is that of Comptroller Saxon, concluding that late fees are not "interest." *See supra* note 3.

[7] *See Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442-43 (7th Cir. 1994) (en banc) (refusing to defer to administrative construction developed only after litigation was commenced), *aff'd*, 116 S. Ct. 595 (1996); *Martin v. Refrigeration School, Inc.*, 968 F.2d 3, 7-8 (9th Cir. 1992) (same).

[8] The opinions lack a sustainable rationale because, among other things, they ignore the many cases holding that single-sum contingent penalties are not interest and are illegal. *See, e.g., Meilink v. Unemployment Resources Comm'n*, 314 U.S. 564, 570 (1942) (the distinction between a "penalty as a fixed *ad valorem* amount taking no account of time, and interest which does depend on time, is persuasive"); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced"); *United States v. Childs*, 266 U.S. 304, 307 (1924) (a penalty is a means of punishment while interest is a means of compensation); *New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (special charges in excess of time-based interest are not allowed).

late fees. However, prior to the 1992 decision in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993), no court ever held that contingent sum-certain late fees were "interest." Moreover, when Congress enacted the NBA in 1864, this Court had already instructed on at least three occasions that "interest" did not include contract penalties such as late fees.

In *Tayloe v. Sandiford*, 20 U.S. 13, 7 Wheat. 7 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . " *Id.* at 17, 7 Wheat. at 8. Similarly, in *Lloyd v. Scott*, 29 U.S. 205, 4 Pet. 173 (1830), the Court held:

> If a party agree [sic] to pay a specific sum exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

Id. at 226, 4 Pet. at 190 (emphasis added). Likewise, just one year before enactment of the NBA, the Court stated with respect to any contingent charge:

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863).

Thus, contingent sum-certain charges like credit card late fees, attorney fees, return check fees and overlimit fees, because they are neither based on the unpaid balance

nor measured by time, were not considered "interest" when the NBA was passed. Rather than contradicting this jurisprudence and lending practice dating back to the early 1800s, the lower court's decision here is completely consistent with this Court's longstanding differentiation between compensatory "interest" and punitive or deterrent contract penalties.

The bank further implies, incorrectly, that the lower court's analysis is inconsistent with *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). *Marquette* held only that a national bank may export its home state's *rate* of interest. Since South Dakota's definition of the components of interest has nothing to do with the *rate* at which interest is allowed, *Marquette* provides no basis for exporting that state's definition of "interest." The bank may still charge the unlimited rates allowed by its home state when it solicits New Jersey consumers. It may not, however, impose a separate, sum-certain penalty fee which is neither a time-based *"rate"* nor "interest." Because New Jersey law does not limit the bank's "interest rates," but only the form and amount of its contract penalties, it does not conflict with § 85.

Nor is the New Jersey decision in conflict with the most favored lender doctrine announced by this Court in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874). That doctrine permits a national bank to charge the highest statutory "interest rate" available to any lender within the bank's home state. Here, the lower court's decision clearly leaves the doctrine intact. Under the court's interpretation, when any South Dakota lender solicits business in New Jersey, that lender, like every other company soliciting business in the state, is bound

by New Jersey's contract and consumer protection laws regulating sum-certain penalties. Similarly, when making intrastate loans, all the banks remain at least on equal footing because they can charge both the same interest and the same late fees. Furthermore, if any South Dakota lender is ever entitled to charge a higher interest rate than other lenders in the state, Citibank, by virtue of its most favored lender status, would also be entitled to charge that higher *rate*. Thus, contrary to the bank's assertion, the lower court's decision has no impact on the most favored lender doctrine.

In summary, though the decision below rejects the recent opinions of two other state supreme courts and a federal court of appeals in similar cases, the other so-called "conflicts" identified by the bank either do not exist or do not matter. In light of *Tayloe*, *Lloyd*, *Spain*, *Marquette* and *Tiffany*, the New Jersey Supreme Court's decision does not contradict this Court's pronouncements. The fact that the decision conflicts with the current, inconsistent and unauthorized views of the OCC is immaterial since those views are not afforded any deference anyway. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (where federal statute provides private right of action and federal remedy, Congress has expressly established the judiciary and not a federal agency as the interpretive authority for the statute's preemptive scope). Thus, the appropriate basis for granting certiorari here is the conflict among the state supreme courts (and the First Circuit) as described in part I of this memorandum.

CONCLUSION

Even though the lower court's decision is correct in every respect, cardholder recognizes that, given the conflict among the state supreme courts and the First Circuit in these matters, this case satisfies the Court's criteria for granting certiorari. Accordingly, respondent does not oppose the bank's petition, but respectfully submits that if the Court grants certiorari here, it should do so on the same three issues as are now before the Court in *Smiley*.

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